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90-347

No. 90- _____

In The

Supreme Court of the United States

October Term, 1990

FRED DANIEL VAN DYKEN,
Petitioner,

vs.

THE STATE OF MONTANA
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT

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QUESTIONS PRESENTED

Petitioner Van Dyken was tried twice for deliberate homicide. Following the first trial, which terminated with a hung jury, the trial court granted several prosecution motions in limine which, among other things, precluded the defense psychiatrist from testifying at the second trial on a critical point to which he had testified at the first trial, and eliminated a critical "mental state" instruction which had been given at the first trial. Petitioner was convicted of deliberate homicide at the second trial.

Petitioner's first trial jury had deadlocked on two lesser included offenses vis-a-vis the principal charge. Nonetheless, when the defense requested a "failure-to-agree" transition instruction at the second trial, it was refused. Instead, the jury was charged with the "acquittal-first" transition instruction proposed by the State.

The questions presented are:

1. Does the double jeopardy clause impose any constraints whatsoever on the extent to which the State may exploit the full exposure of the defense case in the first trial — terminated by a hung jury — to obtain law rulings altering the posture of the case in the State's favor at the second trial?

2. Does the due process clause — specifically, its requirement that the defendant be accorded the full benefit of the reasonable-double standard — require that the States follow the federal rule that a "failure-to-agree" transition instruction respecting the consideration of lesser-included offenses, must be given if requested by the defendant?

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The Petitioner, Fred Van Dyken, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Montana Supreme Court entered in this proceeding May 3, 1990, and from which rehearing was denied on May 25, 1990.

OPINIONS BELOW

The opinion of the Montana Supreme Court is reported at 791 P.2d 1350 (Mont. 1990). The denial of the petition for rehearing was not reported. The opinion and denial of the petition for rehearing are reproduced in Appendices A and E.

JURISDICTION

The judgment of the Montana Supreme Court was entered on May 3, 1990. A timely petition for rehearing was denied on May 25, 1990. This petition for certiorari is filed within ninety days of the denial of the petition for rehearing. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Statutes and constitutional provisions involved are:

The Fifth Amendment to the United States Constitution, which provides in pertinent part:

No person . . . shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . .

The Fourteenth Amendment to the United States Constitution, which provides in pertinent part:

No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

In the early morning hours of December 6, 1984, Missoula County Deputy Sheriff Allan Kimery was shot and killed while attempting to question a suspect in the theft of a tank of gas. The suspect, Petitioner Van Dyken, was arrested a few hours later, and charged with deliberate homicide.

At Petitioner's first trial, in September, 1985, the State presented an extensive array of evidence which tended to show that the intoxicated Van Dyken had shot Deputy Kimery with a revolver he had been carrying under the car seat, as the officer approached the car Van Dyken was driving.[1] The State's evidence also established that the car Van Dyken was driving

[1] Kimery had stopped the car based on the license plate number provided by the convenience store where Van Dyken had driven from a self-service pump without paying for his gasoline purchase.

and the revolver and ammunition he used to shoot Kimery, had been stolen by Van Dyken a few days previously in Great Falls, Montana, from Van Dyken's former mother-in-law and best friend, respectively.

The defense case focussed almost exclusively on the intent element of the crime.[2] While the defendant's mother and several of his friends testified, the major witness for the defense was Dr. Michael Mandel, a prominent San Francisco psychiatrist specializing in psychopharmacology. His testimony, together with that of the other witnesses, established that Van Dyken was a Native American who had been adopted at an early age by a white Great Falls family, and that he was a chronic hereditary alcoholic, which condition began to become apparent in his early teens. Testimony established that Van Dyken — though once readily employable and married — had suffered through years of alcoholism of growing severity, which had the predictable consequences of divorce, continual loss of employment, demoralization, rupture of family relations, forlorn suicide attempts, increasingly erratic conduct, and trouble with the law, initially caused by several incidents of driving while intoxicated. Van Dyken was shown to have reached a critical stage of depression and despondency in November and early December, 1984, during which time he drank non-stop, and committed the senseless thefts of the automobile and revolver. On the morning of December 5, 1984, Van Dyken received a phone call from a Great Falls police detective who wished to interview him concerning the thefts. Breaking his appointment with him, Van Dyken drove to Missoula where he spent the evening drinking and playing pool with friends.[3] During the course of

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[2] Deliberate homicide, a capital offense in Montana and the most serious degree of murder, is defined by Section 45-5-102, MCA as "purposely or knowingly causing the death of another human being."

[3] On the way to Missoula, Van Dyken apparently stopped by the roadside in a futile attempt to locate other property he had stolen from his friends and then abandoned.

the evening he apparently displayed the revolver and ammunition, and made a statement to the effect he might shoot a policeman, if pulled over. No one took the statement seriously.

Dr. Mandel next testified — without objection — to the defendant's recollection of the actual shooting incident [the pertinent portions of Dr. Mandel's testimony at the first trial are printed as Appendix J]. The key information elicited in this regard was that the defendant apparently suffered an alcoholic blackout until aroused by flashing lights of the patrol car, at which point he grabbed the gun, accelerated, and "threw" one shot over his left shoulder out the car window as he fled.[4] The psychiatrist concluded, based on all the information available to him, that Van Dyken didn't mean to kill Officer Kimery, and that in fact his mental condition was so disordered by 3:00 a.m. on December 6, that he could scarcely be said to be capable of rational action at all at that time.

The defendant did not testify on his own behalf.

The jury was instructed on deliberate homicide, and on the two lesser included offenses of mitigated deliberate, and negligent, homicide.[5] They were also given a standard "acquittal-first" transition instruction regarding the procedure to be followed in taking up the various grades of offenses during their deliberations.

After 13 hours of deliberation, the jury requested supplemental instructions on mental state. The next morning

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[4] Van Dyken himself received superficial bullet wounds from Officer Kimery's return fire, delivered before he collapsed dying in the street.

[5] Section 45-5-103 MCA (as in effect in 1984-5) defined mitigated deliberate homicide as follows: "when [a person] purposely or knowingly causes the death of another human being but does so under the influence of extreme mental or emotional stress for which there is reasonable explanation or excuse."

Section 45-5-104 MCA defined negligent homicide as follows: "if [a person] negligently causes the death of another human being."

the Court gave them so-called "Instruction G" [printed as Appendix Q], which explained that "for deliberate homicide and mitigated homicide, the State must prove beyond a reasonable doubt that the defendant not only did an act which caused the death, but that he did it with the knowledge that he was causing or with the purpose to cause the death."[6]

After further deliberations, the jury announced its inability to reach a verdict, and a mistrial was declared. In later opinions rendered prior to the second trial, the trial judge found that "some of the jurors were voting for mitigated deliberate homicide while others were voting for negligent homicide" [See trial court orders of June 4, 1986 and June 9, 1986, printed as Appendices B and C].

Three weeks after the mistrial, the trial court, during a hearing colloquy with counsel, first suggested the possibility that critical portions of the defense psychiatrist's testimony might be inadmissible hearsay [see the Transcript of this October 11, 1985 colloquy, printed as Appendix K]. Based on this suggestion, the State moved in limine to prohibit Dr. Mandel from relating the defendant's version of the crime at the second trial [See Motion in Limine and Memorandum in Support, both dated February 7, 1986, printed as Appendices L and M].

Four days later the State moved in limine to strike Instruction G [See Appendix O].

Responding to these and other prosecution law motions apparently designed significantly to alter the posture of the case and the course of the second trial, the defense on March 31, 1986 filed a Motion in Limine and Brief, in which it requested the trial court to rule that the double jeopardy

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[6] This is the precise definition of the intent element in deliberate homicide, as found in Montana law, used by this Court in deciding *Sandstrom v. Montana*, 442 U.S. 510, 520-21, fn 10 (1979).

clause of the federal constitution prohibited the State from directly utilizing the full exposure of the defense case in the first trial to eliminate, by pretrial legal rulings, what it had identified as the most significant tactical impediments to conviction [this "double jeopardy motion" and supporting Brief are printed as Appendix N].

The trial court did not rule on the double jeopardy motion at this time, but it did, on June 4, 1986, issue a comprehensive pretrial order, in which, among other things, it granted the State's motion in limine to limit Dr. Mandel's testimony [Appendix B]. Both the State and the defense took what was, in effect, an interlocutory appeal from this pretrial order to the Montana Supreme Court, which, after full briefing, found all issues raised by both parties to be non-appealable and dismissed for lack of jurisdiction on November 13, 1986. In the meantime, the trial judge recused himself from the case [See Appendix C].

A new round of pretrial litigation followed. The State filed a renewed motion to strike Instruction G[7] [printed as Appendix O], while the defense filed a motion in limine requesting the Court to rule in advance of trial that it would give Instruction G [Appendix P]. The defense also filed a motion, expressly based on the double jeopardy clause, asking that the Court reconsider its previous ruling eliminating from the second trial the critical portion of Dr. Mandel's testimony concerning the defendant's recollection of the shooting [this motion is printed as Appendix R]. In addition, the defense called up for hearing its unruled-on double jeopardy motion of March 31, 1986 [Appendix N], and submitted a lengthy supplemental Brief in support of the contention advanced there, that the double jeopardy clause forbade pretrial practice aimed at altering the posture of the case in the State's favor, when the *sine qua non* of such practice was former

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[7] In its previous comprehensive order of June 4, 1986, the trial court had not ruled on the Instruction G issue either.

jeopardy, i.e., the full exposure of the defense case in a prior trial [the pertinent portions of this Brief are printed as Appendix S]. Finally, all of these motions (as well as others) were orally argued before the trial court on April 27, 1987.

During the course of this April 27 argument, the prosecutor, Mr. Deschamps, specifically identified two events occurring during the first trial as having led to a hung jury: Dr. Mandel's testimony concerning the defendant's recollection of the shooting, and the giving of Instruction G [the verbatim transcript of the relevant portions of this colloquy is printed as Appendix T]. The prosecutor asked that these impediments to conviction be removed.

On May 4, 1987, the trial court issued a comprehensive pretrial order, in which, among other things, it:

(1) denied the defendant's "overarching" double jeopardy motion;

(2) reaffirmed its earlier ruling prohibiting Dr. Mandel from testifying as to defendant's recollection;

(3) denied the defense motion to use Instruction G, and granted the State's motion in limine to strike Instruction G from further proceedings. The district court opined that the double jeopardy clause imposes no constraints on either party exploiting its experience of the first trial to improve upon its case at the second; that Dr. Mandel's testimony was inadmissible hearsay and would be excluded; and that Instruction G did not state current Montana law respecting the intent element in deliberate homicide.[8] [The entire district court opinion of May 4, 1987, is printed as Appendix D].

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[8] On this last point the trial court stated: "The Montana Supreme Court has rejected the contention that the jury be instructed that the defendant intended to cause death as a result of his action ...*State v. Sigler*, 688 P. 2d 749, 753-55 (1984). It appears that the holding in *Sigler* made it clear that it is not the law that the State must prove defendant caused the death with the knowledge that he was causing it, or with the purpose to cause the death. *Sigler, supra*, at 756-68."

Van Dyken was tried a second time in June, 1987. At this trial, lacking the critical testimony of Dr. Mandel, he took the stand on his own behalf, and was subjected to a lengthy and inevitably damaging cross-examination. On rebuttal, the State psychiatrist, Dr. William Stratford, who had previously been prohibited from testifying as to his own post-arrest examination of Van Dyken, now gave a psychiatric opinion based on listening to Van Dyken testify at trial. His opinion was that the defendant deliberately killed Deputy Kimery.

The intent instructions proposed by the State were given, in modified form, by the court. They, in effect, permitted the jury to convict the defendant of deliberate homicide if it found he had "the conscious object" to shoot the gun in the direction of Officer Kimery — a fact which had already been fairly well established by the testimony at both the first and second trials. [See the transcript of the settlement conference on this point, printed as Appendix U].

The court at the second trial, as it had at the first, determined to instruct the jury on the lesser-included offenses of both mitigated deliberate homicide and negligent homicide. In view of the course of the jury deliberations at the first trial, the defense requested a "failure-to-agree" transition instruction, which would have expressly permitted the jury to consider all the lesser-included offenses along with the principal offense, if unable to agree in the first instance as to guilt on the principal offense.[9] The State offered an "acquittal-first" transition instruction, which required the jury unanimously to acquit the defendant of deliberate homicide before it could even consider the lesser-included offenses. The court refused defendant's transition instructions, and gave the "acquittal-first" instruction tendered by the State.[10] During the settle-

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[9] The defendant's transition instructions, proposed in the alternative, are printed as Appendix H.

[10] This — Court's Instruction 10 — is printed as Appendix G.

ment conference, the court explicitly held that the federal due process clause did not require it to give a "failure-to-agree" instruction, if requested by the defense — as the defense had contended.[11]

After deliberating for some time, the jury returned a verdict of guilt on the principal offense. Petitioner Van Dyken was sentenced to life imprisonment without the possibility of parole.

On appeal, Van Dyken advanced numerous contentions, among which were:

(1) that, as a matter of substantive state and federal law, Instruction G represented a correct articulation of the intent element required to be proved in a deliberate homicide case, and should have been given at the second trial;

(2) that as a matter of substantive state and federal law, defense psychiatrist Mandel's testimony concerning Van Dyken's recollection of the circumstances of the shooting was admissible hearsay, and should have been permitted to be given at the second trial;

(3) that, irrespective of the substantive law merits of the first two claims, the federal double jeopardy clause forbade altering the posture of the case so significantly in the State's favor, as had been done by eliminating Instruction G and suppressing the crucial psychiatric testimony;

(4) that the federal due process clause required a trial court to give a "failure-to-agree" transition instruction, if requested by the defense.

In its Opinion [printed as Appendix A], the Montana Supreme Court found against the defendant on all points. On the double jeopardy question, while the discussion is confusing, the Court is at least clear in the view that "where the first proceeding results in a mistrial, the parties are placed in the same position as if there had been no trial at all . . . Each

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[11] The entire text of this settlement conference is printed as Appendix I.

[party] was able to use the knowledge gained from having gone through the first trial and alter their positions accordingly.[12] We hold the district court properly denied defendant's pretrial motion to limit evidence in the second trial to only that introduced in the first."[13]

With respect to the transition instruction issue, the court acknowledged the existence of a serious conflict in the jurisdictions, and noted that "the United States Supreme Court has not resolved the conflict." It then went on to adopt the minority position advanced in *People v. Boettcher*, 505 N.E.2d 594 (N.Y. 1987), which is that the "acquittal-first" is the legally proper transition instruction to use in all instances. In so doing, the court, of course, implicitly rejected Petitioner Van Dyken's contention that the due process clause entitles the defendant to a "failure-to-agree" instruction if requested.

REASONS FOR GRANTING THE WRIT

I. This case presents a significant question of first impression in double jeopardy jurisprudence, which ought to be decided by this Court.

This case presents a significant question of first impression in double jeopardy jurisprudence: does the double jeopardy clause impose any constraints at all on the manner in which a second trial is conducted, following the termination of the first because of a hung jury?

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[12] The opinion did not specify in what respects the defense had altered its position in the second trial, except as compelled to, in response to pre-trial rulings favorable to the State.

[13] This misstates the thrust of defendant's pretrial motion. Because of this, and the confusing discussion of the double jeopardy question in general, defendant's petition for rehearing [printed as Appendix F] requested a reconsideration and clarification on this point. The petition was denied, without a clarification [See Appendix E].

More specifically: when a mistrial is declared out of "manifest necessity," does that mean that, at a second trial, the trial court may simply *ignore* the "enhanced possibility"[14] that a criminal defendant "may be found guilty even though innocent,"[15] because of the opportunity a second trial affords the state to "hone its trial strategies and perfect its evidence?"[16]

The question — which is fundamental — may also be phrased thus: is the double jeopardy bar always an all-or-nothing proposition? Can't circumstances arise where the central policies of the clause would operate to prohibit certain techniques of obtaining the defendant's conviction at a subsequent trial, even though the retrial itself were permitted? Can't the state go so far in exploiting its knowledge of the defense case, fully exposed at the first trial, to emasculate it at the second, that the defendant's conviction can be adjudged an improper consequence of former jeopardy in the legal, as well as the factual, sense?

So far as counsel can discover, this question has never been answered — indeed, rarely asked. Presumably this is because so much of this court's double jeopardy jurisprudence of the last decades has been focussed on quite different sets of circumstances. Most of the recent double jeopardy cases have involved either (1) mistrials declared for other reasons than jury deadlock; or (2) acquittals or convictions (or circumstances constituting the functional equivalent of acquittal or conviction), in relation to subsequent prosecutions or punishments for conduct which arguably comprises the same transaction covered by the former acquittal or conviction.

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[14] *Green v. U.S.*, 355 U.S. 184, 187-188 (1957), quoted in *U.S. v. DiFrancesco*, 449 U.S. 117, 127-28 (1981).

[15] *Ibid.*

[16] *Tibbs v. Florida*, 457 U.S. 31, 41 (1982)

Hung juries have been thought to present a less problematic situation. As stated in *Richardson v. United States*, 468 U.S. 317, 323 (1984):

> It has been established for 160 years, since the opinion of Justice Story in *United States v Perez*, 9 Wheat. 579 (1824), that a failure of the jury to agree on a verdict was an instance of "manifest necessity" which permitted a trial judge to terminate the first trial and retry the defendant, because "the ends of public justice would otherwise be defeated."... We have constantly adhered to the rule that a retrial following a "hung jury" does not violate the double jeopardy clause.

Because of the long endurance of this rarely-challenged doctrine,[17] it has generally been assumed — though not decided — that a finding that a deadlocked jury was properly discharged ends all further double jeopardy inquiry. Yet from a functional point of view, this is by no means a self-evident proposition. As has often been pointed out in the literature, retrial after a hung jury implicates — often in full or fuller measure — the central policy concerns of the clause applied in other contexts.[18] Particularly, of course, it implicates what Justice O'Conner has characterized as the policy "lying at the core of the clause's protections":[19] the policy aimed at preventing the state from making

"repeated attempts to convict an individual for

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[17] *Richardson* was the first case in many years specifically to reaffirm the rule that "a trial judge may discharge a genuinely deadlocked jury and require the defendant to submit to a second trial," 468 U.S. at 324.

[18] The leading — and most incisive — exposition of this perspective is found in Findlater, *Retrial After A Hung Jury: The Double Jeopardy Problem*, 129 U. Pa.L.Rev. 701 (1981).

[19] *Tibbs, supra*, 457 U.S. at 41.

> an alleged offense, thereby ... enhancing the possibility that even though innocent he may be found guilty."[20]

Because the full exposure of the defense case to the prosecutor's thorough reflective scrutiny after the first trial has always been identified as one of the primary factors which would contribute to the risk of unjust conviction arising from any retrial,[21] it would certainly seem a theoretical possibility that a defendant's retrial after a jury discharge — while itself permissible — could be conducted in relation to the first trial in such a way that it would offend the basic protections afforded by the clause. This could happen if, for instance, the prosecutor was able, between trials, to alter or eliminate one or more of the features of the defense case, in the absence of which the jury would almost certainly have convicted at the first trial. In such an eventuality, it could fairly be said that the defendant's conviction upon retrial resulted directly from his former subjection to jeopardy.

The Van Dyken case presents, unfortunately, the practical realization of this theoretical possibility. Here, the prosecutor's pretrial practice in advance of the second trial was so obviously aimed at weakening the defense case by obtaining law rulings suppressing its principal efficacious features, that it required little or no ingenuity of defense counsel to put before the court several motions — expressly based on the double jeopardy clause — designed to prevent a guilty verdict engineered by the state's reshaping the presentation of law and evidence at the second trial. These motions were exhaustively briefed and argued, both at the trial and appellate level; and at the trial level, at least, an extensive opinion was forthcoming, which found that the double jeop-

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[20] *DiFrancesco, supra*, 449 U.S. at 127-28.

[21] *Id.*, at 128; *Arizona v Washington*, 434 U.S. 497, 508 n. 24 (1978); *Ashe v Swenson*, 397 U.S. 436, 477 (1970).

ardy clause imposed no constraints on the manner in which either party attempted to reshape the second trial, based on the first one, nor the manner in which the court ruled on the substantive merits of their law motions.[22]

The trial court then ruled on the merits by reaffirming its earlier June 4, 1986, order prohibiting Dr. Mandel from testifying as to defendant's version of the shooting incident; granting the state's request to suppress Instruction G; and conditionally granting the state's motion to use the testimony of its psychiatrists, Drs. Stratford and Walters.[23]

In making these rulings, the court essentially endorsed the prosector's request to eliminate each one of the elements of the first trial which had led to the jury's failure to convict the defendant of deliberate homicide, and to its ultimate deadlock. In the prosecutor's view, quite unequivocally expressed at the penultimate pretrial hearing in this cause, there were three reasons why the state had not obtained a deliberate homicide conviction in Livingston:[24] (1) the giving of Instruction G; (2) Dr. Mandel's rendition of the defendant's version of the shooting incident, in the course of explaining his analysis of the defendant's state of mind; (3) the court's refusal to permit Drs. Stratford and Walters to offer, on rebuttal, their professional opinion about defendant's having acted purposely or knowingly in causing Sgt. Kimery's death.[25]

In accordance with these rulings, the defendant was

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[22] This was an important point. The defense motions were primarily aimed at the array of prosecution motions in limine presented before the second trial; not at attempts to gather new evidence. (In fact, the state presented almost no new evidence at the second trial.)

[23] *See*, Opinion and Order of May 4, 1987 — Appendix D.

[24] Petitioner's first trial took place in Livingston, Montana, due to a change of venue from Missoula; the second took place in Helena, Montana.

[25] *See*, the verbatim transcript of these remarks — Appendix T.

forced to take the stand and testify as to the shooting incident, in order that Dr. Mandel could testify meaningfully; he was subjected to vigorous and effective cross-examination; Drs. Walters and Stratford offered strong opinion evidence on rebuttal that Van Dyken deliberately killed Sgt. Kimery, including evidence they gleaned from listening to the defendant testify;[26] and neither Instruction G nor its requested equivalents were given to the jury. Unsurprisingly, the defendant was this time convicted of deliberate homicide.

There could hardly be a clearer instance of "the prosecutor using the first proceeding as a trial run of his case," *Arizona v Washington*, 434 U.S. at 508. Based on analysis of failures of the state and successes of the defense at the Livingston trial — including analysis of the results of juror interviews which identified the crucial factors leading to a failure to convict — the prosecution vigorously proceeded to capitalize on the fruits of defendant's jeopardy, by successfully seeking to eliminate nearly every identified stumbling-block to conviction at the second trial. The defense specifically objected to this approach to prosecution, to no avail. The Petitioner contends that a second trial in which a conviction is obtained in this manner contravenes the double jeopardy guarantee.

Because this question is so clearly presented by the record here, and because the question of what, if any, restrictions the double jeopardy clause imposes on the conduct of hung-jury retrials, is of such obvious importance in the

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[26] Both Stratford and Walters had been prohibited from testifying as to their initial December 6, 1984, examination of Van Dyken, because it had been conducted with no Miranda warning. Additionally, the State's often-renewed October, 1985, motion to be granted a compelled psychiatric examination of the defendant had been thrice denied by the court. Nevertheless, once the defendant testified, the State psychiatrists were accorded great latitude in what they could say.

The ultimate weight of the state's psychiatric rebuttal testimony is underscored by the fact the second trial jury requested — and was given — a transcript of Dr. Stratford's testimony to study during its deliberations.

criminal law, Petitioner suggests it would be appropriate for the Court to accept this case for plenary review.

II. The manner in which defendant's conviction was gained at his second trial, which needlessly differed from his first in critical respects favorable to the state, contravenes the central policies of the double jeopardy clause.

Double jeopardy is a most complex and difficult area of the law; no less an authority than this Court has explicitly cautioned that in this area there are no "bright-line rules," *U.S. v Jorn*, 400 U.S. 470, 486 (1971), and has characterized its own line of decisions on this subject as "a conscious refusal to channel the exercise of discretion according to rules based on categories of circumstances," *id* at 485.[27] Nonetheless, certain general principles emerge from the court's double jeopardy decisions, among which the following would be crucial to the determination of this case:

1. In the case of any doubt on a double jeopardy question, the doubt is to be resolved "in favor of the liberty of the citizen," and a retrial disallowed, *Downum v U.S.*, 372 U.S. 734, 738 (1963).

2. The general design of the double jeopardy clause is that described in *Green v United States*, 355 U.S. 184, 1987-88 (1957), quoted in *United States v DiFrancesco*, 449 U.S. 117, 127-128 (1981):

> "The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.... The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with

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[27] In dissent in 1982, Justice White put the matter another way: "As our cases in this area indicate, the meaning of the Double Jeopardy Clause is not always readily apparent." *Tibbs, supra*, at 47.

> all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

3. Integral to this design is the purpose to protect against the risk of unjust conviction inherent in repeated trials. This was made clear in the recent leading case, *DiFrancesco, supra,* at 128:

> ...central to the objective of the prohibition against successive trials is the barrier to affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding...Implicit in this is the thought that if the Government may reprosecute, it gains an advantage from what it learns at the first trial about the strengths of the defense case and the weaknesses of its own.

Much of the double jeopardy jurisprudence of the last few decades has in fact turned on the question of possible prosecutorial advantage gained as a result of a mistrial. The possibility of the state's case being strengthened on a second trial has been the deciding factor in mistrial cases not involving a jury deadlock, such as *Downum v U.S.*, 372 U.S. 734 (1963); *Burks v U.S.*, 437 U.S. 1 (1978); and *Oregon v Kennedy*, 456 U.S. 667 (1982); *See generally*, Findlater, *Retrial After A Hung Jury: The Double Jeopardy Problem*, 129 U.Pa.L.Rev. 701, 718-732 (1981). As was stated in *Arizona v Washington*, 434 U.S. 497, 508 n. 24 (1978): "The prohibition against double jeopardy unquestionably forbids the prosecutor to use the first proceeding as a trial run of his case."

The foregoing line of cases has scrutinized with care the intended or foreseeable effect of a mistrial on the strength of

the prosecution's case, with the awareness that, with the vast resources available to the state, enhancing that strength too greatly at a second trial unacceptably increases the chances for unjust conviction. Double jeopardy considerations have been held to bar further proceedings where "the prosecutor is using the superior resources of the State... to achieve a tactical advantage over the accused," *Id.* at 508.

Of course, as the Montana Supreme Court noted in its Van Dyken Opinion, all of the cases just cited concerned situations other than hung-jury retrials; many were cases where the mistrial involved prosecutorial "fault," including ones where the mistrial had been deliberately provoked by the state. In Van Dyken, the state was not responsible for the declaration of a mistrial. Thus — as Petitioner has always conceded — the preceding cases are only analogically, not directly, on point.[28]

Nonetheless, the same policy considerations are implicated in the case of a mistrial declared on account of a hung jury. In this situation, in fact, the problem is perhaps more egregious as far as the interests of the accused identified in *Green* are concerned, for the *entire* defense has been exposed; the prosecution is aware of every weakness, in *minute detail*, of its own case; and, furthermore, the very fact the jury was unable to agree indicates the increased probability that conviction at the second trial will be "unjust." In this circumstance, it would seem to be a legal necessity to prevent the second trial from becoming a mere variation of the first, orchestrated for conviction by the state. Furthermore, it appears that double jeopardy jurisprudence is ample to accomplish this result. As stated in the leading Ninth Circuit case on double jeopardy

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[28] In its Opinion herein, the Montana Supreme Court was apparently of the view that Petitioner's double jeopardy motion in limine depended on an allegation that the September, 1985, mistrial had been declared without manifest necessity. Petitioner's briefs in support of the motion made clear this was not his position (see Appendices N and S), as did his appeal brief. In addition, his Petition for Rehearing (Appendix F) addressed this misconception specifically.

law, *U.S. v Sanders*, 591 F2d 1293, 1296 (1979): double jeopardy considerations cannot "be applied mechanically or without attention to the particular problem confronting the trial judge." As stated in *Illinois v Somerville*, 410 U.S. 458, 464 (1973), "virtually all of the [double jeopardy] cases turn on the particular facts and thus escape meaningful categorization." And as stated in *Gori v U.S.*, 367 U.S. 364, 369 (1961): "Judicial wisdom counsels against anticipating hypothetical situations... in which the defendant would be harassed by successive, oppressive prosecutions, or in which a judge exercises his authority to help the prosecution, at a trial at which its case is going badly, by affording it another, more favorable opportunity to convict the accused."

This same principle should find application in the hung-jury retrial situation to move the discretion of the court to prevent, insofar as possible, the second trial from becoming "a more favorable opportunity to convict the accused."

It may be contended, of course, that it would be impossible as a practical matter to implement such a determination. Certainly, a second trial could never be an exact replica of the first. If nothing else, the participants' performances would vary. Neither would it be easy to defend a hard and fast line against variation which would disallow, for example, the use of new and significant evidence that has come to light since the first trial. But where, as here, a fundamental alteration of the trial is being produced by purely legal rulings made in response to motions submitted months after the first trial, and when these motions essentially represent after-thoughts of technique, the state is gaining too much from the jury's failure to agree. The hung jury exception to the ban on successive prosecutions is problematic enough, without letting it become an invitation for the exercise of the perfect wisdom of hindsight by the state, to a degree that renders conviction certain the next time, guilt or innocence of the accused notwithstanding.

In this regard, it is noteworthy that the state, at the first

trial, presented a very strong prima facie case on the *mental* element of the crime, based on objective manifestations of defendant's intent. None of the state's motions presented before the second trial had a tendency to add to or strengthen this evidence. Instead, they tended either to weaken the defense case, or to strengthen the state's rebuttal. In other words, the whole thrust of the state's pretrial practice since the first trial was to exploit every possible avenue of attack on the defense *revealed by the defendant's full exposure to jeopardy up to verdict in September, 1985.* It is the constitutional contention of the defense that the state's *directly* utilizing the prior placement of the defendant in jeopardy, substantially or wholly to alter the posture of the case and the conduct of the second trial in its favor, exposes the defendant to double jeopardy in the legal sense, and should not be allowed. Emphasis must be placed in this analysis on the word "direct." Human affairs and jury trials being what they are, each side is bound to gain certain advantages from there already having been a trial.[29] Some of these advantages may not even be consciously recognized by the parties. But where the state very deliberately seeks heavily-briefed favorable legal rulings in advance of the second trial, all of which are manifestly based on its knowledge of the defense case — and of its own case — gleaned from the experience of the first trial, the pendulum swings toward the prospect of conviction grounded not so much on guilt, as on former jeopardy. The gravamen of the state's case becomes second-guessing, afterthought, the perfect wisdom of hindsight — all made possible by the defendant's prior subjection to jeopardy.

In this situation, the mandate of double jeopardy would seem to be to deny all proposed improvements in the state's case flowing from legal analysis, advocacy and maneuvering, as opposed to actual discovery of new factual evidence. The

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[29] In this sense, the idea (alluded to by the Montana Supreme Court) that a retrial may be conducted "as if the first trial never occurred," is a patent fiction. If that were so in this case, for instance, no pretrial motions in limine would have been filed by the state before the second trial — as they were not before the first.

"search for truth," which is the ultimate aim of the criminal trial, would not have been seriously impeded, if at all, by requiring the state to prove its case again with the evidence it assembled in the nine months following the crime, unaugmented by the fruits of over 15 months' worth of legal reflection on the tactics of the trial. Permitting the state to put on its "dream case" is violative of the Double Jeopardy Clause, when the dream could not have been dreamed if the defendant had not already undergone the full ordeal of a trial.

III. There is a serious conflict between the federal circuits and among approximately twenty state courts of last resort as to the constitutional status of an "acquittal-first" versus a "failure-to-agree" transition instruction governing a jury's consideration of lesser included offenses. This conflict is now ripe for resolution by this Court.

In the last decade, there has been a proliferation of appellate litigation concerning transition instructions in criminal cases where lesser-included offenses are submitted to the jury. The resultant welter of different rules on this subject — and widely varying rationales for the same rules — invites a timely resolution by this Court. This is particularly so, since the precise constitutional status of lesser-included offense instructions themselves stands in some need of clarification.[30]

A "transition instruction" is, of course, the instruction whereby the trial court directs the jury when and how in the

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[30] This Court has determined they are required by the due process clause in capital cases (if the evidence warrants), *Beck v Alabama*, 447 U.S. 625 (1980); and has come within a hairsbreadth of declaring that the due process clause entitles all criminal defendants to them (if the evidence warrants), *Keeble v U.S.*, 412 U.S. 205, 213 (1973). It is perhaps now time to acknowledge they have become "fundamental" in modern criminal law.

If this is acknowledged, then it becomes clear that the form of the transition instruction has constitutional implications. The recognition of this undoubtedly underlay Justice White's dissent from the denial of certiorari the last time this subject came before the Court, in *Spierings v Alaska*, 107 S.Ct. 679, 679-80 (1986).

course of their deliberations they should consider the lesser-included offenses the court has submitted to them along with the principal offense.

There are two basic kinds of transition instruction. The traditional transition instruction — known technically as an "acquittal-first" instruction — "tells a jury it must find a defendant not guilty of the charged offense before it can consider a lesser included offense," *State v Allen*, 717 P.2d 1178, 1179 (Or. 1986). It "requires unanimity in finding the accused not guilty of the crime charged before the jury may proceed to consider lesser included offenses," *Pharr v Israel*, 629 F.2d 1278, 1281 (7th Cir. 1980). A "failure-to-agree" instruction, on the other hand, expressly permits the jury to consider and deliberate about all the possible offenses — the charged offense and all the lesser-includeds — once there is any disagreement over the defendant's guilt on the principal offense.

Stimulated, no doubt, by this Court's decisions in *Keeble v U.S.*, 412 U.S. 205 (1973) and *Beck v Alabama*, 447 U.S. 625 (1980) (both of which intimated a criminal defendant's due process right to have his jury instructed on lesser-included offenses where the evidence warrants it), several federal circuits formulated the doctrine that a defendant is also entitled to a "failure-to-agree" transition instruction, upon timely request, in a case where lesser-included offenses are being submitted to the jury. *See, U.S. v Tsanas*, 572 F.2d 340, 346 (2nd Cir. 1978); *Pharr v Israel*, 629 F.2d 1278, 1282 (7th Cir. 1980); *U.S. v Jackson*, 726 F.2d 1466, 1469-70 (9th Cir. 1984). The *Jackson* case held it to be reversible error for a trial court to give an "acquittal-first" instruction when it was objected to by the defendant, and suggested (without holding) that the due process clause mandated the giving of the "failure-to-agree" charge. In *Pharr*, on the other hand, while the right of a Seventh-Circuit defendant to have a failure-to-agree instruction submitted to the jury on request was affirmed, the court held that the rule did not enjoy constitutional status, and thus did not bind state courts. Other federal

courts which have addressed the issue have resolved it similarly, in favor of the "failure-to-agree" instruction.[31]

In recent years, a number of state courts of last resort have also held either (1) that the defendant is entitled to a "failure-to-agree" transition instruction if he requests one; or (2) that a "failure-to-agree" instruction should be given as a matter of course when lesser-included offenses are submitted to a jury. *State v Allen*, 717 P.2d 1178, 1180-81 (Oregon 1986); *People v West*, 291 N.W.2d 48, 52 (Mich. 1980); *State v Duff*, 554 A.2d 214;, 217-18 (Vermont 1988); *State v Thomas*, 533 N.E.2d 286, 291-93 (Ohio 1988). *Thomas* and *Duff*, at least, opined that the failure-to-agree instruction was mandated by the federal due process clause. *Duff, supra*, 554 A.2d at 218; *Thomas, supra*, 533 N.E.2d at 292.

On the other hand, several state courts of last resort have held that an "acquittal-first" transition instruction is proper. *See, e.g., Ballinger v State*, 437 P.2d 305 (Wyoming 1968); *State v Wilkins*, 238 S.E.2d 659 (North Carolina 1977). In recent years, at least two state high courts have approved the giving of an "acquittal-first" transition instruction even in the face of defense objection, and promulgated relatively elaborate opinions criticizing the reasoning underlying the federal rule. *People v Boettcher*, 505 N.E.2d 594 (New York 1987); *State v Staatz*, 768 P.2d 142 (Ariz. 1988), reaffirming *State v Wussler*, 679 P.2d 74 (Ariz. 1984).

Several state high courts have interpreted their pattern transition instruction as being a "failure-to-agree" instruction: that is, as "not requiring an unanimous decision on the greater offense before consideration of the lesser," *People v Padilla*, 638 P.2d 15, 18 (Colorado 1981); *accord, State v Korbel*, 647 P.2d 1301, 1305 (Kansas 1982). These opinions did not say, however, that that construction of the instruction was

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[31] *See, e.g., Catches v U.S.*, 582 F.2d 453, 458-59 (8th Cir. 1978) and *Jones v U.S.*, 544 A.2d 1250, 1251-54 (D.C.App. 1988).

constitutionally required. Similarly, the court in *Commonwealth v Edgerly*, 435 N.E.2d 641 (Massachusetts 1982), approved the failure-to-agree transition instruction given by the trial judge, without stating it was required.

In another important variation, the California Supreme Court in *People v Kurtzman*, 758 P.2d 572 (Calif. 1988) held that, although the jury must acquit the defendant of the greater offense in order to convict him of a lesser, it should be instructed that it may consider or discuss any or all of the offenses in any order. The Court held: "it is clear...that the trial court erred in instructing the jury not to 'deliberate on' or 'consider' voluntary manslaughter unless and until it had unanimously agreed on second degree murder." *Id.*, at 580.

In *Dresnek v State*, 697 P.2d 1059 (Alaska 1985), the Court — prospectively — reached a result similar to the California Court in *Kurtzman*: it held that in the future, Alaska trial courts should instruct juries that they "are free to deliberate on the charged offense and the lesser-included offenses in any order they wish, but are precluded from returning a verdict on a lesser offense without also returning a verdict on the greater offense." *Id.*, at 1064. At the same time, however, the court held that in the case at bar, it was not error to have refused defendant's "failure-to-agree" transition instruction, and to have instructed the jurors that they could not consider the lesser-included offense until they unanimously acquitted on the greater offense. *Id.*, at 1060-63.

In *Spierings v Alaska*, 107 S.Ct. 679 (1986), this Court denied a petition for certiorari arising from *Dresnek*. In dissent, Justice White noted that the decision of the Alaska Supreme Court "conflicts with the approach followed in the Courts of Appeals for the Second and Ninth Circuits... I would grant the petition to resolve this conflict." *Id.*, at 679-680. In the nearly four years since the *Spierings* petition was rejected, the conflict referred to has both widened and deepened: there are now at least five state jurisdictions in conflict with the

federal circuits, and at least three and perhaps five distinct positions are being taken by the various courts addressing the issue. On a question like this, there would seem little merit in the existence of such a wide variety of rules — none of them statutory — among the jurisdictions.

The Van Dyken case appears to furnish this Court with an ideal factual underpinning for resolving the conflict. At Petitioner's first trial, the jury deliberated concerning all of the possible offenses, then hung. At the close of the evidence at the second trial, the defense offered two versions of "failure-to-agree" transition instructions, and explained to the court why they were particularly necessary, considering the background of the case.[32] The state offered a standard Montana pattern "acquittal-first" transition instruction, which was given. The trial court specifically found that the federal due process clause did not require the giving of either of the defendant's proposed instructions.[33]

Petitioner disagrees with the trial court's opinion. Included within the Due Process Clause of the Fourteenth Amendment is the right to be afforded the full benefit of the reasonable doubt standard. *In re Winship*, 397 U.S. 358 (1970). In *Beck v Alabama*, 447 U.S. 625, 634 (1980), this Court held that "providing the jury with the 'third option' of convicting on a lesser included offense ensures that the jury will accord the defendant the full benefit of the reasonable-doubt standard." It would seem to follow that a jury instruction which greatly dilutes the benefit — even forecloses the possibility — of the "third option" may be constitutionally impermissible, because it needlessly exposes the defendant to the "substantial risk"[34]

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[32] See the settlement colloquy, Appendix I; defendant's proposed instructions, Appendix H.

[33] See Appendix I (settlement colloquy); Appendix G (State's acquittal-first instruction).

[34] *Keeble v U.S.*, 412 U.S. 205, 212 (1973).

of an unjust conviction on the principal offense. The risk of such a conviction is especially great where, as here, proof of one of the elements of the greater offense is weak or vigorously contested, but the defendant clearly was involved in committing a criminal act.[35] It is probably at its maximum in a murder case, where it is apparent that the defendant shot the victim, and the only contested element is one of intent.[36]

When a jury is given an "acquittal-first" transition instruction, the "third option" is essentially taken away from it, if it becomes split during its deliberations on the question of the defendant's guilt of the principal offense. This is because, under the instruction, the lesser offenses cannot even be considered until the whole jury votes to acquit of the greater offense. If those jurors favoring conviction on the greater offense are firm, those favoring the lesser offense must, under the instruction, either hold out until a mistrial is declared or surrender their convictions and vote for the greater offense. Members of the jury who are convinced that the defendant is guilty of some offense, but have substantial doubts about an element of the greater offense, may well vote for conviction on the greater offense rather than cause a mistrial. That possibility is especially relevant in this case because the Van Dyken jury was well aware that there had been a previous mistrial.[37]

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[35] As explained in *Keeble*: "where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction." Id., at 212-213.

[36] As explained in *Beck*, *supra*, at 625: "When the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense — but leaves some doubt with respect to an element that would justify conviction of a capital offense — the failure to give the jury the 'third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction."

[37] During voir dire, the previous mistrial was alluded to on several occasions.

As explained in *Jones v U.S.*, *supra*, 544 A.2d at 1253:

> The flaw in the "acquittal-first" instruction is that it requires the jury to take an affirmative step by rendering an acquittal of the greater offense before it may even consider the lesser offense. When the jury receives [such an] instruction, it is encouraged — some would say coerced — to favor conviction of the greater offense...This instruction gives a bargaining edge to jurors favoring conviction of the greater offense... jurors favoring the lesser offense, unless they can dissuade those favoring the greater, must either hold out until a mistrial is declared because of the deadlock, or surrender their opinions and vote for the greater offense.

In a case like Van Dyken's, of course, there is no realistic possibility that the jurors favoring conviction of the greater offense can be persuaded to render an outright acquittal. Nor is there a realistic possibility that those favoring the lesser offense will hold out until a mistrial is declared, leaving the clearly culpable defendant without a conviction on any charge. If the transition instruction is followed,[38] the "third option" is essentially withdrawn from the jury, and the defendant is needlessly[39] deprived of the full benefit of the reasonable doubt standard. Such a result simply does not accord with due process, as interpreted by this Court in *Winship*, *Keeble*, and *Beck*.

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[38] It is often suggested that the jury may not follow the transition instruction. Indeed, it may not. But it hardly needs to be said that criminal jurisprudence cannot operate on that assumption. And jurors often do follow instructions; *See*, *Carter v Kentucky*, 450 U.S. 288, 299, 301-303 (1981).

[39] No one has yet offered a satisfactory explanation why a jury should be instructed to deliberate in such an unnatural manner.

CONCLUSION

For all of these reasons, a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

No. 88-038

IN THE SUPREME COURT OF THE STATE OF MONTANA

1990

STATE OF MONTANA,
Plaintiff and Respondent,

-vs-

FRED DANIEL VAN DYKEN,
Defendant and Appellant.

APPEAL FROM: District Court of the Fourth Judicial District, In and for the County of Missoula, The Honorable James B. Wheelis, Judge presiding.

COUNSEL OF RECORD:

For Appellant:
Margaret L. Borg, Public Defender's Office, Missoula, Montana;
William Boggs, Missoula, Montana

For Respondent:
Hon. Marc Racicot, Attorney General, Helena, Montana;
Elizabeth S. Baker, Asst. Attorney General, Helena;
Robert L. Deschamps, III, Missoula, Montana

Submitted on Briefs: January 4, 1990
Decided: May 3, 1990

Justice John Conway Harrison delivered the Opinion of the Court.

Fred Van Dyken appeals the jury decision convicting him of deliberate homicide in the death of Officer Allen Kimery. At the first trial held September 9 through 21, 1985 in Park County, Montana, the jury was unable to reach a verdict after several hours of deliberation. Judge Thomas A. Olson declared a mistrial. A second trial, held June 8 through 26, 1987 in Lewis and Clark County, resulted in a conviction for deliberate homicide. We affirm the lower court's decision.

Several issues are presented for review:

1. Is defendant's conviction upon retrial barred by former jeopardy?

2. Did the District Court err in ruling that the expert witness for the defense could not testify to the defendant's version of the crime?

3. Did the District Court properly instruct the jury regarding consideration of lesser included offenses?

4. Did the District Court properly instruct the jury regarding the mental state required for conviction of deliberate homicide?

5. Did the District Court err in admitting the rebuttal testimony of the State's expert witness?

On November 30, 1984, Josie Morgan, defendant Fred Van Dyken's ex-mother-in-law, reported to the Great Falls Police Department that her black and white 1979 Chevrolet Monte Carlo had been stolen. That same evening Chris and Sandy Tigart, friends of the defendant, reported that a .357 Charter Arms revolver, a checkbook and wallet had been stolen from their Great Falls home. Also that evening, defendant cashed a number of the Tigarts' checks at various Great Falls establishments and was seen driving a black and white Monte Carlo. During most of the evening defendant was accompanied by his friend Mike Masikka and the two spent the night drinking in area taverns. At one point the defendant told Masikka he had a .357 pistol in the car trunk and asked of Masikka if he "knew anybody [he] wanted to waste or anything."

After taking Masikka home early in the morning of December 1, the defendant drove to Missoula where he telephoned his friend Jeff Braida. Defendant then returned to Great Falls.

Detective Joseph McGuire of the Great Falls Police Department called defendant on the morning of December 5 to inform defendant he was a suspect on the burglary of the Tigart home. Later that day defendant admitted to Chris Tigart that he had stolen the items from the Tigart home and would like to return them.

In an attempt to retrieve those items, defendant drove the black and white Monte Carlo to the Lincoln area where he had discarded the items on December 1, but failed to find any of the stolen property. Defendant then continued to Missoula where he again contacted Jeff Braida. Along with Jeff's brother, Tim Braida, the three spent the evening of December 5 drinking and playing pool. During the evening defendant pulled the .357 revolver from under the seat and showed it to the Braida brothers, declaring while pointing his index finger at the window as if holding the gun, "If a cop pulls me over, I'll just blow them [sic] away." Defendant drove the Braidas to their parents' home sometime after 2:00 a.m. December 6, and indicated he was going to his little brother's house.

The Braidas would later testify that they noticed nothing unusual or abnormal about defendant's behavior that evening and that he did not appear drunk nor was his driving impaired by drinking. Other witnesses who saw defendant that night and in the early morning hours of December 6 would testify similarly.

On December 6, 1984, shortly before 3:00 a.m., the attendant on duty at the SuperAmerica gas station on Brooks Street in Missoula, reported to 911 that a man in a black Chevrolet drove away without paying for gas. The 911 dispatcher broadcast the reported theft along with the car's license plate number, Montana 2-81609. Soon thereafter Missoula County Deputy Sheriff Allen Kimery radioed that he had the suspected vehicle in sight, identified it by license number, and requested the assistance of a city police officer since the incident had occurred within the city's jurisdiction.

A few minutes later a resident of the neighborhood that Deputy Kimery radioed from, called 911 to report that an officer was shot and lying in the street. Other officers were dispatched to the scene. Deputy Kimery was then transported to a nearby hospital where he died from a gunshot wound to his chest, the bullet having been fired from a distance of approximately three feet.

Officers began a city-wide search for the 1979 black and white Monte Carlo. The vehicle was soon discovered in an alley in Missoula's lower Rattlesnake area, riddled with bullet holes and abandoned.

At approximately 4:00 a.m., defendant called the Braidas and asked if they would give him a ride. On their way to pick up the defendant, the Braidas stopped at the SuperAmerica station on Brooks Street for gas. Jeff put gas in the tank while Tim went to pay for it. Tim, in talking with the gas station attendant, learned of the gas theft and shooting. When he found out the car involved had Great Falls license plates, Tim decided that he and Jeff would not pick up the defendant. Tim told the SuperAmerica attendant the defendant's name and where the Braidas were to meet him. The Braida brothers then returned home.

The SuperAmerica attendant then phoned 911 to relay the information given by Tim Braida. When the defendant was located at the convenience store indicated by Tim Braida, he was arrested for carrying a concealed weapon. Defendant was searched and a set of car keys recovered. The keys fit the ignition and trunk of the Monte Carlo abandoned in the lower Rattlesnake area. Later, defendant was charged with deliberate homicide in connection with the death of Allen Kimery.

Following his arrest defendant was taken to St. Patrick's Hospital where he was treated by the emergency room physician, Dr. Warren Guffin, for abrasions and lacerations from bullet fragments or bullet injury and blood and urine samples were drawn. Psychologist Herman Walters and psychiatrist William Stratford also interviewed defendant shortly after his arrest to determine if defendant was a risk to himself and to observe defendant's general emotional and cognitive functioning.

Fred Van Dyken took the stand on his own behalf at his second trial. The defendant testified that he had been drinking and smoking marijuana on the night of December 5 and morning of December 6; that he remembered accelerating his car and that he had his gun and "threw a bullet over [his] left shoulder;" that he does remember getting the gun; that he remembered a lot of loud bullets and that after he drove away there was a hole in the window. Defendant also testified that he had no desire, purpose or intent to shoot the officer and that because he was afraid the officer was still pursuing him after he drove away, defendant "ditched" his car and called his friends the Braidas.

On cross-examination defendant testified his purpose in grabbing the gun was to throw a shot over his shoulder and that he intended to shoot the gun. Defendant also admitted that he knew the person approaching his car was an officer when he saw the flashing lights. Testimony was also elicited that defendant had rolled down the driver's window before shooting.

The defense presented evidence intended to show that, because of the amount of liquor consumed on the night in question, defendant was unable to form the mental state of "knowingly" or "purposely" necessary to a conviction of deliberate homicide. The defense offered the testimony of its expert witness, Dr. Mandel, to show defendant was incapable of forming the necessary mental state. Dr. Mandel based his testimony on a three and one-half hour interview with defendant before the first trial, a one hour interview with defendant before the second trial and conversations with defendant's mother, Hope Van Dyken, and his ex-mother-in-law, Josie Morgan, and defendant's friend Chris Tigart. In rebuttal of Dr. Mandel's testimony, the State called Dr. Walters and Dr. Stratford, both of whom saw defendant shortly after his arrest. The State also presented in its case-in-chief, Dr. Guffin, the emergency room physician who treated defendant immediately after his arrest on December 6, who testified that there were no physical manifestations of defendant being under the influence of alcohol when Dr. Guffin examined him.

Defendant was charged by information with deliberate

homicide arising out of the shooting death of Officer Allen Kimery in the early morning hours of December 6, 1984. The case was assigned to District Judge Thomas A. Olson and, following a change of venue tried before a Park County jury in September, 1985. When, after thirteen hours of deliberation, the jury notified Judge Olson it was unable to reach a unanimous verdict, the judge, over defense counsel's objection, ordered the jury to continue its deliberations. Following two more hours of deliberation, the jury was still unable to reach a decision and notified the judge of its stalemate. Judge Olson then declared a mistrial. Neither counsel for the defense or the prosecution objected to the procedure, nor did either counsel request that the jurors be polled.

On December 23, 1985, defendant appeared before Judge Olson and asked to change his plea to guilty pursuant to a plea agreement reached with the State. The judge rejected the plea, however, because the defendant disputed the intent element of the offense.

During the period between trials, both parties filed pretrial notions in the District Court and petitioned the Supreme Court. On June 3, 1986, the State filed a petition for supervisory control with the Supreme Court, seeking rulings on certain of its motions then before the District Court. This petition was denied. In a June 4, 1986 order concerning both parties' pretrial motions, the District Court denied defendant's motion to dismiss on grounds of double jeopardy and denied the State's motion to compel an independent psychiatric evaluation of the defendant designed to assist in determining the defendant's state of mind at the time of the shooting.

From this order, the defendant petitioned the Supreme Court for a writ of supervisory control and the State sought an interlocutory appeal. The Supreme Court consolidated the two proceedings and in a November 13, 1986 order found both to be interlocutory in nature and, therefore, not appealable. Additionally, the Court held the declaration of a mistrial under the circumstances did not constitute a bar to a second trial on the grounds of former jeopardy.

The defendant then moved the Supreme Court for a rehearing on the double jeopardy issue. In its January 20,

1987 order denying the rehearing, the Supreme Court set out specific reasons why a second trial could be had without placing the defendant in double jeopardy.

After several recusals, Missoula District Judge James Wheelis assumed jurisdiction of the case, and the second trial was had, this time in Lewis and Clark County during June, 1987. In pretrial rulings, the District Court prohibited the defendant's expert witness, psychiatrist Michael Mandel, from reciting the defendant's version of the offense or testifying to the credibility of the defendant's statements about the events surrounding Officer Kimery's death. The defense then opted to place defendant Van Dyken on the stand.

The District Court also ruled that the testimony of the State's experts, psychiatrist William Stratford and psychologist Herman Walters, was restricted to their observations of the defendant and any unsolicited remarks made by him. The State's experts were not allowed to testify as to the results of any questions which they directed to the defendant when they examined him within the first few days following his arrest, because no Miranda warnings (Miranda v. Arizona (1966), 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694) were given prior to their evaluation of the defendant.

Following a lengthy trial, the jury found the defendant guilty of deliberate homicide. The defendant was sentenced to life imprisonment at the Montana State Prison and designated a dangerous offender. He is ineligible for parole or participation in the supervised release program.

It is from this judgment that the defendant appeals.

ISSUE I: Double Jeopardy

Defendant argues that his retrial on the charge of deliberate homicide violates Federal and State constitutional prohibitions against double jeopardy. The defendant bases this argument on two allegations: 1) at the first trial, the District Court declared a mistrial without first polling the jurors after they announced they were deadlocked, amount-

ing to a mistrial without manifest necessity; and 2) the State, because it had the advantage of assessing the defense at the first trial, was able to significantly alter its posture at the second trial.

According to defendant, the jury instruction given concerning lesser included offenses contributed to the jury deadlock. At both the first and second trials the jury received the following instruction on lesser included offenses:

> In order to reach a verdict in this case, it is necessary that you consider the crime of deliberate homicide first, and that all twelve of you find the Defendant either guilty or not guilty of that charge.
>
> In the event you find the Defendant guilty of deliberate homicide, you need go no further as you will have reached a verdict.
>
> In the event you find the Defendant not guilty of deliberate homicide, you must then consider the lesser offense of mitigated deliberate homicide. All twelve of you must find the Defendant guilty or not guilty of this charge.
>
> If you find the Defendant guilty of mitigated deliberate homicide, you have reached a verdict, and you need proceed no further.
>
> If you find the Defendant not guilty of mitigated deliberate homicide, you must then consider the lesser offense of negligent homicide. All twelve of you must find the Defendant guilty or not guilty of this charge. When you have done so, you have reached a verdict, and you need proceed no further.

Defendant argues that the District Court should have polled the jury to determine if, at any time during its deliberations, the jury had unanimously voted to acquit the defendant of deliberate homicide and was deadlocked only as to the defendant's guilt on one of the lesser-included offenses. The defendant contends that if the jury had in fact acquitted the defendant of deliberate homicide, a second trial on that charge

would amount to double jeopardy. Defendant further argues that by failing to poll the jury, the District Court effectively precluded the operation of the double jeopardy bar. Under such circumstances, the defendant avers, District Judge Olson declared a mistrial without manifest necessity and the defendant was therefore subjected to double jeopardy on the deliberate homicide charge.

The thrust of defendant's argument is that failure to poll the jury impliedly acquitted the defendant of deliberate homicide and the District Court further erred in denying him an evidentiary hearing on the matter. This is the very issue which the defendant raised in his 1986 application to this Court for a writ of supervisory control. In both our November 13, 1986 order dismissing the application and our January 20, 1987 order denying the petition for rehearing on the same matter we rejected defendant's argument. As such, the doctrines of both res judicata and law of the case prevents an appellant from raising the issue on appeal because the issue has been previously resolved by this Court in this case.

Whether labeled res judicata or law of the case, the effect is the same.

> Prior Montana cases disclose the general rule that where a decision has been rendered by the Supreme Court on a particular issue between the same parties in the same case, whether that decision is right or wrong, such decision is binding on the parties and the courts and cannot be relitigated in a subsequent appeal. (Citations omitted.). . .
>
> [A]n exception to this general rule exists where the case must be remanded to the District Court for further proceedings because of reversal on an unrelated issue. In such case this Court may correct a manifest error in its former opinion and announce a different ruling to be applied prospectively to future proceedings in the case. This exception to the general rule is recognized in Montana at least since 1955 when we held

> that the law of the case announced in the first appeal, and which governed the second trial, does not prevent the appellate court from correcting a manifest error in its former opinion to apply to future proceedings where doing so promised justice without substantial injury to anyone. (Citations omitted.)

State v. Zimmerman (1977), 175 Mont. 179, 185, 573 P.2d 174, 177-78.

Our earlier decision rendered in response to defendant's earlier application for writ of supervisory control addressing the issue of failure to poll the jury before declaring a mistrial remains binding and cannot be relitigated. None of the stated exceptions apply in this case.

In the second prong of his double jeopardy attack, defendant contends that the declaration of mistrial was without manifest necessity and thus, afforded the State an unfair advantage in the second trial. Defendant further argues, as he argued in a pretrial motion, that the State should be prohibited in the second trial from presenting "substantial additional categories of evidence not presented at the first trial or from substantially altering the posture of the defense case in the State's favor as a result of events occurring at the first trial." The District Court denied defendant's motion. Likewise, we reject his argument.

As is often noted the double jeopardy clause of both the United States and Montana constitutions provide three basic protections. It protects against (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. United States v. DiFrancesco (1980), 449 U.S. 117, 129, 101 S.Ct. 426, 433, 66 L.Ed.2d 328, 340. (Emphasis added.)

Defendant would have us believe that double jeopardy protection against prosecution for the same offense after acquittal bars retrial because the jury was not polled, and therefore a declaration of mistrial without manifest necessity resulted. Thus, defendant suffered a second prosecution for the same offense after he was impliedly acquitted.

As discussed above there is no merit to defendant's argument that he should have been impliedly acquitted of deliberate homicide because the judge did not inquire into the reasons for the jury deadlock, thus resulting in a mistrial without manifest necessity. The mistrial was declared because the jury could not reach a verdict. A declaration of mistrial under such circumstances is manifestly necessary. Arnold v. McCarthy (9th Cir. 1978), 566 F.2d 1377, 1386; Arizona v. Washington (1978), 434 U.S. 497, 503, 98 S.Ct. 824, 829, 54 L.Ed.2d 717, 726-27.

We agree that where the State provokes a mistrial with the intention of subjecting the defendant to the burden of multiple prosecutions, the double jeopardy clause will prevent a retrial. United States v. Dinitz (1976), 424 U.S. 600, 611, 96 S.Ct. 1075, 1081, 47 L.Ed.2d 267, 276. In the case at bar, however, the State in no way provoked the mistrial. Nor did the State request a mistrial. In addition, when District Court Judge Olson declared a mistrial, the defendant made no objection. As the United States Supreme Court has held:

> [T]he strictest scrutiny is appropriate when the basis for the mistrial is the unavailability of critical prosecution evidence, or when there is reason to believe that the prosecutor is using the superior resources of the State to harass or to achieve a tactical advantage over the accused.
>
> At the other extreme is the mistrial premised upon the trial judge's belief that the jury is unable to reach a verdict, long considered the classic basis for a proper mistrial. The argument that a jury's inability to agree establishes reasonable doubt as to the defendant's guilt, and therefore requires acquittal, has been uniformly rejected in this country. Instead, without exception, the courts have held that the trial judge may discharge a genuinely deadlocked jury and require the defendant to submit to a second trial. This rule accords recognition to society's interest in giving the prosecution one complete opportunity to convict those who have

violated its laws. (Footnotes omitted.)

Arizona v. Washington, at 508-09, 98 S.Ct. at 832, 54 L.Ed.2d at 730.

The jury had deliberated for approximately fourteen hours and the foreman indicated to Judge Olson that further deliberations would most likely not result in a verdict. Under the circumstances the mistrial was declared for manifest necessity.

The defendant's argument that the State could not use evidence at the second trial which had not been presented at the first trial is not compelling. The general rule of law is that where the first proceeding results in a mistrial, the parties are placed in the same position as if there had been no trial in the first instance. Section 46-16-701, MCA; Waite v. Waite (1964), 143 Mont. 248, 389 P.2d 181; 58 Am.Jur.2d New Trial, § 588 (1989).

Here, neither party gained an unfair advantage over the other because of the mistrial. Each was able to use the knowledge gained from having gone through the first trial and alter their positions accordingly. We hold that the District Court properly denied defendant's pretrial motion to limit evidence in the second trial to only that introduced in the first.

ISSUE II: Defense Expert Testimony

The defendant called Dr. Michael Mandel as an expert witness at both trials. With the help of Dr. Mandel, a psychiatrist, defendant sought to establish that he was incapable of forming the necessary intent to commit deliberate homicide at the time defendant killed Officer Kimery.

Defendant argues that Rules 803(4), 703, and 705, M.R.Evid., support admission of Dr. Mandel's testimony regarding events surrounding Officer Kimery's shooting.

Rule 803(4), M.R.Evid., an exception to the hearsay rule permits:

> Statements made for purposes of medical diagnosis or treatment and describing medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or

> sensations, or the inception of general character of the case or external source thereof insofar as reasonably pertinent to diagnosis or treatment

Rule 703 deals with the basis of opinion testimony by experts:

> The facts in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in a particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Rule 705 addresses disclosure of facts underlying an expert opinion:

> The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

The above rules, however, are subject to Rule 403, M.R.Evid. Evidence, although relevant, may nonetheless be excluded if its probative value is outweighed by its potential for prejudice. Rule 403, M.R.Evid. Furthermore, this Court has consistently held that "the question of admissibility of evidence must in every case be left largely to the sound discretion of the trial court, subject to review only in case of manifest abuse." Cech v. State (1979), 184 Mont. 522, 531-32, 604 P.2d 97, 102; Gunderson v. Brewster (1970), 154 Mont. 405, 466 P.2d 589; Moen v. Peter Kiewit & Sons, Co. (1982), 201 Mont. 425, 655 P.2d 482. This discretion includes wide latitude in determining the admissibility of expert testimony. Cash v. Otis Elevator Co. (1984), 210 Mont. 319, 332, 684 P.2d 1041, 1048; Krohmer v. Dahl (1965), 145 Mont 491, 402 P.2d 979.

We find no abuse in the discretion exercised by the trial

court. Judge Olson rejected defendant's argument that Dr. Mandel, under Rules 703 and 705, might rely on the description of the shooting as related by the defendant and disclose this description even though it might otherwise be inadmissible. At the second trial the defendant again raised this issue. When defendant requested a rehearing on the matter, Judge Wheelis agree with Judge Olson's order and opinion of June 4, 1986. In the opinion Judge Olson noted that to allow Dr. Mandel to repeat defendant's version of the shooting would be to throw out the other rules of evidence and to ignore the time-honored reasons for excluding hearsay and unreliable evidence. The opinion continued:

> According to Judge Weinstein, it is assumed for purposes of Rule 703, that the underlying facts are reliable and trustworthy. Further, Weinstein notes that the reason for disclosure is not to prove the underlying facts but to show what the experts are using for his [sic] opinion. Weinstein is also of the view that the reliability question, which must be asked when using Rule 703, is the same question to be asked when allowing a medical expert to repeat a medical history under Rule 803(4). See 4 Weinstein's Evidence, ¶ 803(4)(01), at 803-146 to -147.
>
> . . .
>
> The testimony of Fred Van Dyken concerning the shooting event is not sufficiently reliable to qualify under the medical exception to the hearsay rule set forth in Rule 803(4).

The District Court then prohibited Dr. Mandel from testifying to defendant's version of the shooting event. Because the defendant's testimony was not sufficiently reliable to qualify under the Rule 803(4) medical exception, neither was it reliable enough to be used as the basis for Dr. Mandel's expert opinion under Rule 703, M.R.Evid.

The trial court here properly exercised its discretion. Under Rule 703, Rule 705 or Rule 803(4), Dr. Mandel's testimony was subject to limitations. As our sister court in Utah noted:

> A psychiatrist or a psychologist of course cannot be made a conduit for testifying in court as to any and all out-of-court statements made. (Footnote omitted.) As with admission of evidence of any kind, great discretion is accorded the trial judge in the determination of admissibility. The trial court must, as with any evidence, assess the inherent reliability of the testimony, the relevance of the testimony, and undertake a balancing test, particularly of prejudice versus probativeness under Rule 403.

State v. Schreuder (Utah 1986), 726 P.2d 1215, 1225. It is apparent from the portion of the opinion and order set out above that the trial court in the present case considered the reliability and relevancy of the testimony attempted to be conveyed through Dr. Mandel. We find no abuse of discretion.

Defendant also argues that disallowing Dr. Mandel to testify regarding defendant's version of the shooting violated defendant's due process rights to present relevant defensive evidence. Defendant claims that the trial court's decision denied him his right against self-incrimination and the opportunity to present a complete defense.

As previously noted the trial court only curtailed Dr. Mandel's testimony regarding the actual shooting event. No limitations were placed on his testimony concerning defendant's other statements to him or concerning other information the doctor relied on as a basis for his expert opinion. Dr. Mandel did, in fact, testify about the bases of his opinion which included conversations had with the defendant.

It is error to allow psychiatric witnesses to state their ultimate conclusion without discussing the bases for such conclusion. State v. Rhoades (W. Va. 1981), 274 S.E.2d 920, 922; State v. Wade (N.C. 1979), 251 S.E.2d 407, 409. However, no error results where, as here, the expert is permitted to testify as to the bases of his opinion.

To allow Dr. Mandel's recitation of defendant's statements was hearsay ruled not within any exception. The defendant has no constitutional right to have these hearsay statements placed in evidence. It must be remembered that,

> A defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to the testimony he gives, and that waiver is no less effective or complete because the defendant may have been motivated to the witness stand in the first place only by reason of the strength of the lawful evidence adduced against him.

Harrison v. United States (1968), 392 US. 219, 222, 88 S.Ct. 2008, 2010, 20 L.Ed.2d 1047, 1051.

Defendant next avers that because the trial court granted the State's motion in limine regarding the expert testimony, defendant was compelled to testify. Thus, he argues, his right against self-incrimination as guaranteed by the Fifth Amendment to the United States Constitution and Art. II, Sec. 25 of the Montana Constitution was violated. These guarantees protect persons from testifying against themselves. "The key to this rests with determining if appellant is compelled to testify or merely required to make tactical decisions regarding the defense of his position." Matter of C.L.R. (1984), 211 Mont. 381, 386, 685 P.2d 926, 929.[1]

Here it is clear that defendant's decision to testify was a tactical decision arrived at by him and his counsel. The trial court inquired about the decision, saying "I take it there is no problem with the decision of the defense to place the defendant on the stand and, I gather, testify about the substance of the trial." Defendant or his counsel made no objection or response.

The mere fact that defendant's version of the shooting would not otherwise have been brought before the jury does not render his decision compelled. As the United States Supreme Court held, "That the defendant faces such a dilemma demanding a choice between complete silence and

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[1] Superseded by Statute as stated in Matter of Baby Boy Scott (Mont. 1988), 767 P.2d 298, 45 St.Rep. 2362. The 1985 Legislature amended § 41-3-609, MCA, thus superseding that portion of Matter of C.L.R. which set forth the standard for termination parental rights. That part of the opinion dealing with the Fifth Amendment protection against self-incrimination is unaffected by the later case of Matter of Baby Boy Scott.

presenting a defense has never been thought an invasion of the privilege against self-incrimination." Williams v. Florida (1970), 399 U.S. 78, 84, 90 S.Ct. 1893, 1897, 26 L.Ed.2d 446, 451.

ISSUE III: Lesser -Included Offenses

Defendant asserts that the trial court erred in its refusal, upon request of the defense, to instruct the jury that it could consider the two lesser included offenses without first unanimously acquitting the defendant of the principal offense. At the second trial the defense proffered two "failure to agree" instructions. Such instruction, the defendant argues, would permit the jury to consider and deliberate about all possible offenses, i.e., the charged offenses and all lesser-included offenses, in the event there is any disagreement over the defendant's guilt as to the principal offense.

The trial court, however, gave the "acquittal first" instruction (alternatively labeled "lesser included offenses" instruction) previously set out in the double jeopardy discussion above. Instructions stating the elements of deliberate homicide, deliberate mitigated homicide, and negligent homicide were also given.

The basic rule in this state is that the trial court's instructions must cover every issue or theory having support in the evidence. State v. Thornton (1985), 218 Mont. 317, 320, 708 P.2d 273, 276. Also, the court must instruct on lesser included offenses if any evidence exists in the record which would permit the jury to rationally convict the defendant of a lesser offense and to acquit him of a greater. Thornton, at 317, 708 P.2d at 276 (quoting State v. Ostwald (1979), 180 Mont. 530, 538, 591 P.2d 646, 651). On appeal this Court is charged with reviewing jury instructions as a whole and if they fairly cover the issues and tender the case to the jury, they are sufficient. State v. Smith (1986), 220 Mont. 364, 382, 715 P.2d 1301, 1312.

The defendant admits the giving of an "acquittal first" instruction is not per se erroneous, but argues that where a defendant requests a "failure to agree" instruction, giving an

"acquittal first" instruction is error. This Court has not previously considered such an argument, but many other courts have, with a wide variety of results. The United States Supreme Court has not resolved the conflict.

In a recent case the Court of Appeals of New York addressed the giving of acquittal first versus failure to agree instructions.

> [A]pproval of the "unable to agree" transition charge sought by the defendant would have a deleterious effect on the [State], for whose benefit the option of the submission of a lesser included offense was originally created "to prevent the prosecution from failing where some element of the crime charged was not made out" (People v. Murch, 263 N.Y. 285, 291, 189 N.E. 220). [Footnote omitted.] Under such a charge, the jury could convict a defendant of the lesser included offense without actually having found him not guilty of the greater. And, regardless of the jury's actual findings or lack of findings regarding the greater offense, the defendant would be deemed not guilty of its commission . . . and a retrial on the greater offense would be barred under settled double jeopardy principles. [Citations omitted.] . . . [E]stablished precedent suggests that a contrary policy should prevail: that the [State] should not be precluded from retrying a defendant on the greater offense unless a jury actually finds him innocent of that charge.

People v. Boettcher (N.Y. 1987), 505 N.E.2d 594, 597.

The Boettcher court continued its discussion, noting Federal case holdings that a defendant is entitled to a failure to agree instruction upon timely request, but rejected the Federal cases because,

> [t]hey give insufficient weight to the principle that it is the duty of the jury not to reach compromise verdicts based on sympathy for the defendant or to appease holdouts, but to render

> a just verdict by applying the facts it finds to the law it is charged [citation omitted]. It is no doubt true, as we have noted in the past, that in jury rooms, as well as all other deliberative bodies, some strong members are able to impress their will upon the weaker [citation omitted]; but acknowledgment of the imperfection of human nature is quite a different thing from the creation of an environment conducive to such behavior. For the same reason, we must reject the defendant's contention that the [failure to agree] charge promotes efficient use of judicial resources by obviating the need for protracted deliberations when a jury becomes deadlocked on the top count by providing a lesser included offense upon which a compromise can be reached.

Boettcher, 505 N.E.2d at 597-98.

We find the New York court's reasoning compelling. For the reasons stated above we hold that giving the acquittal first instruction even in the face of defendant's request for the failure to agree instruction was not error.

ISSUE IV: Mental State

The District Court ruled in favor of the State regarding the jury instruction to be given on the definition of "purposely" and "knowingly." The following instructions were given:

> A criminal homicide is deliberate homicide if it is committed purposely or knowingly.
>
> A person acts purposely with respect to conduct which is an element of the offense or to a result which is an element of the offense when he has the conscious object to engage in that conduct or to cause that result.
>
> A person acts knowingly with respect to the result of conduct or a circumstance described by a statute defining an offense when he is aware that it is highly probable that the result

> will be caused by his conduct or the circumstance. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence. Equivalent terms such as "knowingly" or "with knowledge" have the same meaning.

Defendant argues that the instruction set out above concerning the mental state required to convict on a charge of deliberate homicide was incorrect. Defendant contends that his proposed instruction, which the trial court ruled an erroneous statement of the law, should have been given. The proposed instruction would have required that the jury find the defendant had acted "with the knowledge he was causing or with the purpose to cause the death."

Defendant's proposed instruction is not the law in Montana. It is no longer necessary to prove specific intent as an element of the crime unless the statute defining the offense requires as an element thereof specific purpose. State v. Starr (1983), 204 Mont. 210, 218, 664 P.2d 893, 897. As the trial court noted in refusing defendant's proffered instructions, a defendant can properly be convicted of deliberate homicide even though he may not have intended that the death result from the act where he contemplated the same kind of harm or injury to the victim. State v. Sigler (1984), 210 Mont. 248, 264-66, 688 P.2d 749, 757-58.

Defendant labels the Sigler holding an "anomaly" and contends it should be overruled. On the contrary, Sigler is well-settled law and its holding has been affirmed often by this Court. See State v. Blalock (1988), 232 Mont. 223, 756 P.2d 454; State v. McKimmie (1988), 232 Mont. 227, 756 P.2d 1135; State v. Ballenger (1987), 227 Mont 308, 738 P.2d 1291; State v. Koepplin (1984), 213 Mont. 55, 689 P.2d 921. We once again affirm the Sigler holding and find that the trial court correctly instructed the jury concerning mental state.

ISSUE V: Rebuttal Testimony of State's Expert Witness

Finally, defendant contends the trial court abused its

discretion in allowing the State's expert witnesses, psychiatrist William Stratford and psychologist Herman Walters, to rebut Dr. Mandel's opinion regarding the defendant's mental state. Defendant premises his objection on the fact no Miranda warnings were given before Dr. Stratford and Dr. Walters interviewed him within hours of his arrest on December 6, 1984. Defendant further contends that any communication between himself and the doctors is protected by the psychologist-patient privilege provided in § 26-1-807, MCA.

Preliminary determination as to the qualification of a person to be a witness rests with the trial court. Rule 104(a), M.R.Evid., and § 46-16-211, MCA. The trial judge determines the witness' competency and the party asserting incompetency has the burden of proving it. State v. Stephens (1982), 198 Mont. 140, 143, 645 P.2d 387, 389. Unless a specific exception applies, a witness generally may be disqualified only if he is incapable of expressing himself or is incapable of understanding the duty to tell the truth. Rule 601, M.R.Evid. State v. D.B.S. (1985), 216 Mont. 234, 243, 700 P.2d 630, 636.

On appeal, this Court defers to the discretion of the District Court on the admission of evidence, State v. LaPier (1984), 208 Mont. 106, 111, 676 P.2d 210, 213, and reviews the District Court's rulings for manifest abuse. State v. Courville (Mont. 1989), 769 P.2d 44, 47, 46 St.Rep. 338, 341.

Upon review of the record as a whole, we find no abuse of discretion here. We defer to the trial court's discretion and find that the rebuttal testimony of Dr. Stratford and Dr. Walters was properly admitted.

Finding no error in the lower court proceedings, we affirm the jury verdict below.

John Conway Harrison
Justice

We concur:

J. A. Turnage
Chief Justice
John C. Sheehy
Diane G. Barz
R. C. McDonough
Fred Weber
William E. Hunt, Sr.
Justices

APPENDIX B

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF MISSOULA

* * * * * * * * * * * *

STATE OF MONTANA,	*	Cause No. 6877
Plaintiff,	*	Filed: June 6, 1986
vs.	*	
FRED DANIEL VAN DYKEN,	*	
Defendant.	*	

* *

ORDER CONCERNING PRE-TRIAL MOTIONS

After the jury trial in this matter resulted in a jury being unable to reach a verdict, the court heard arguments and received briefs on pretrial motions prior to the second jury trial, now scheduled for the Beaverhead County Courthouse in Dillon, Montana, June 16, 1986. The court now rules on the motions as follows:

MOTION TO LIMIT DR. MANDEL'S TESTIMONY

At the first trial, Dr. Michael Mandel, a San Francisco psychiatrist, testified concerning his diagnosis of defendant and, without objection, to the shooting event itself. Dr. Mandel obtained his description of the shooting event from defendant, himself. The State seeks to limit this testimony at the second trial.

It is clear that defendant's version of the shooting cannot be placed in evidence as an admission under Rule 801(d)(2), because it is introduced not by the State, but by defendant, himself.

It is argued that Dr. Mandel may, under Rules 703 and 705, rely on the description of the shooting as related by defendant and have this description disclosed even though it

might otherwise be inadmissible. I do not adopt this reasoning. To do so would be to throw out the other rules of evidence and to ignore the time-honored reasons for excluding hearsay and unreliable evidence. According to Judge Weinstein, it is assumed, for purposes of Rule 703, that the underlying facts are reliable and trustworthy. Further, Weinstein notes that the reason for disclosure is not to prove the underlying facts but to show what the experts are using for his opinion. Weinstein is also of the view that the reliability question, which must be asked when using Rule 703, is the same question to be asked when allowing a medical expert to repeat a medical history under Rule 803(4). See 4 Weinstein's Evidence, 803(4)(01), at 803 - 146 to 147.

In United States v. Ironshell, 633 F2d 77 (8th Cir. 1980), the court subjected certain hearsay testimony to a two-prong test before admitting it under the 803(4) exception. The test requires that the declarant's motive be consistent with the purpose of the rule (reliable statements to a treating professional); and that the physician reasonably relied on the information in diagnosis or treatment.

In State v. Ostwald, 590 P2d 646 (Mont. 1979), the court said:

> The psychologist could not have testified to defendant's intoxication at the time of the commission of the offenses which he was charged because the psychologist did not see him at that time. The expert testimony could only have gone to the likelihood that if defendant had in fact been drinking on the day of the crime, then the disease of alcoholism in which he suffers could make it more probable that his intoxication would prevent him from acting knowingly and purposely . . .

180 Mont. at 536, 591 P2d at 649, 650. The Ostwald case involved a burglary conviction and the actual matter at issue was whether the defense was required to give the court notice of its expert witness. The above dicta indicated that an expert witness might not be allowed to offer testimony on the

particular factual circumstances at the time of the crime.

This court, therefore concludes, that the testimony of Fred Van Dyken concerning the shooting event is not sufficiently reliable to qualify under the medical history exception to the hearsay rule set forth in Rule 803(4). The court grants the state's motion to prohibit Dr. Mandel or any other medical or psychological witness from repeating defendant's version of the shooting event.

MOTION TO COMPEL EVALUATION OF THE DEFENDANT

The state seeks to compel defendant to submit to a psychiatric evaluation concerning defendant's state of mind at the time of the shooting. The state argues that defendant is relying on a defense of mental disease or defect and that defendant can be forced by court order to submit to an evaluation.

Defendant has consistently argued that he does not have a mental disease or defect and that his defense is simply that he was not acting purposely or knowingly when he shot Deputy Kimery. The defendant concedes that the statutes require a defendant in this position to give notice to the state of his defense but since his defense does not involve that of mental disease or defect, he cannot be forced to be evaluated.

I agree with the defendant's argument. What the state seeks to do in this case is to prove an essential element of the charge (that the defendant was acting purposely or knowingly) with evidence extracted from the defendant himself. Most observers agree that the Montana laws on this subject are confusing and represent a legislative compromise. The claim that the insanity defense has been eliminated in Montana criminal trials does not square with the statutory provisions that allow a jury to consider the defendant's condition on the question of the requisite state of mind. Since the state is seeking the death penalty in this case, I resolve doubts in the law against the state. I find authority for my conclusion in other states. For example, in State v. Vosler, 345 NW 2d 806 (Nebraska 1984), the Nebraska supreme court held that it was

reversible error to introduce expert testimony based on a compelled psychiatric examination where the defendant is not relying on the defense of insanity but only on the defense that he did not have the requisite state of mind at the time of the offense. To permit such testimony was held to be a violation of the defendant's Fifth Amendment protection.

The state's motion to compel the defendant to submit to evaluation is denied.

DELIBERATE HOMICIDE INSTRUCTIONS

The court will draft proposed instructions on deliberate homicide and the lesser-included offenses and will meet with counsel at the beginning of the trial in this matter. [Sic: sentence and subheadings omitted in original.] Use of alcohol treatment records during the first trial of this matter, the state learned that the defendant had undergone alcohol treatment on several different occasions. The state thereupon subpoenaed the records and the defendant claimed the records were confidential and privileged. The court examined the records in camera and ruled that the documents were confidential and privileged under Section 53-24-306, MCA. The court did, however, authorize release of all documents which were made available to Dr. Mandel in preparation of his testimony for the defendant, on the grounds that the defendant by this action, waived his privilege.

The court denies the investigative subpoena which seeks the remaining confidential documents.

MOTION TO ADD DR. MUSCATEL

The state apparently seeks to add the witness of a clinical psychologist, Dr. Ken Muscatel, who previously examined the defendant in preparation of the first trial. This examination was done at the defendant's request and therefore would be protected by the patient-psychologist privilege.

The court denies the state's request to use Dr. Muscatel as a witness.

DEFENDANT'S MOTION TO DISMISS

The defendant moves to dismiss the charge of deliberate homicide on the grounds of double jeopardy. The jury in the first trial was unable to reach a verdict on the deliberate homicide charge or on any of the lesser-included offenses. It appears from affidavits of jurors that in the last stages of the deadlocked deliberations, some of the jurors were voting for mitigated deliberate homicide while others were voting for negligent homicide. From this, the defendant argues that the jury impliedly found the defendant not guilty of deliberate homicide.

The record in this case clearly shows that the jury was unable to reach any verdict in the case. It would be, in my opinion, a miscarriage of justice to try to decide an implied verdict on the basis of the status of negotiations at the time the jury deliberations broke down. No verdict was delivered by the jury showing a unanimous decision had been reached on any of the offenses.

Defendant's motion to dismiss is denied

DATED this 4th day of June, 1986.

HON. THOMAS A. OLSON, District Judge

APPENDIX C

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF MISSOULA

* * * * * * * * * * *

STATE OF MONTANA,	*	Cause No. 6877
Plaintiff,	*	Filed: June 10, 1986
v.	*	
FRED DANIEL VAN DYKEN,	*	
Defendant.	*	

* *

ORDER GRANTING CONTINUANCE PENDING APPEAL

On June 9, 1986, Robert Deschamps, Missoula County Attorney, and Margaret Borg, Public Defender, appeared before the court sitting in Bozeman, Montana. Defendant waived his presence. Presented to the court was a joint motion requesting a continuance of the trial date now set for June 16, 1986, in Beaverhead County, Montana. Defendant also filed a waiver of speedy trial in connection with the motion.

The court summarized the status of the case: The State was seeking an appeal of the court's denial of the request for a compelled psychological evaluation. Defendant was seeking an appeal on the issue of double jeopardy, whether defendant can be re-tried on deliberate homicide when the previous jury appeared to be deadlocked while considering mitigated deliberate homicide and negligent homicide and, also, whether the psychologist should be prevented from telling defendant's version of the shooting event. A review of the rules shows that the State has a right to appeal rulings which, in effect, suppress evidence while defendant has a right to appeal only from a final judgment. However, counsel for defendant argued that the constitutional issue of double jeopardy could and should be appealed to the Supreme Court prior to the re-trial.

The court hereby grants a continuance of the trial date now set for June 16, 1986, in Beaverhead County, Montana,

to permit both plaintiff and defendant to appeal the foregoing issues to the Montana Supreme Court. The court recommends, if necessary, that the Montana Supreme Court suspend its rules to permit this appeal prior to trial on the grounds that: (a) The matter has previously been heard, and a transcript has already been prepared of the first trial, so that there will be no delay concerning a transcript. (b) A previous trial has been held and the re-trial should be as free from error as possible, and (c) Such an appeal would be in the interest of justice.

As to any delays in this case, the court file will show that I have attempted to bring this matter to trial without delay. Many of this court's trial settings have been continued at the request of the county attorney or defense counsel. I have attempted to preserve defendant's right to a fair trial without the pressure of outside influence, while balancing the interests of the deceased's family in a final decision in this case.

The undersigned, having been the presiding judge at the first trial of this matter, hereby removes himself from further proceedings in this matter. It is clear to me that the same district judge should not be required to sit through a re-trial of a criminal case of this proportion. The court's first rulings based on the then state of the record and the presence or lack of objections might well be different at a re-trial when different testimony is presented and new objections are made. Defendant might conclude, as would members of the public, that the court has either changed its mind or has been influenced to do so by sources unknown. In any case, a new trial judge would remove these questions and would be able to hear the matter in a fresh and unencumbered manner. My removal also does away with any concerns that defendant might have that the court has been pressured by law enforcement officials as to any possible sentence. For these and other reasons, the court removes itself and calls on Judge Harkin to appoint a new judge in this matter

DATED this 9th day of June, 1986.

HON. THOMAS A. OLSON, District Judge

APPENDIX D

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF MISSOULA

* * * * * * * * * * *

STATE OF MONTANA,	*	Cause No. 6877
Plaintiff,	*	Filed: May 4, 1987
v.	*	
FRED D. VAN DYKEN,	*	**OPINION**
Defendant.	*	**AND**
	*	**ORDER**

* * * * * * * * * * * * * * * * * * *

Pending before the Court are a number of pre-trial motions submitted by both the State and the Defendant. Briefs in support and in opposition to these motions have been filed and the Court is prepared to issue its ruling.

The Court has considered Defendant's "overarching" motion relative to double jeopardy.

Without extensive discussion of its history and characteristics, it may be said that the prohibition against double jeopardy was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. Underlying this doctrine is the principle that the State, with all of its resources and power, should not be able to make repeated attempts without restrictions to convict an individual. As with most protections afforded criminal defendants, the limitation on repeated attempts to convict arose from cruel abuse. Experience teaches that the State should not be allowed in all cases to compel a defendant to live in a persistent state of anxiety and insecurity. The right of an individual not to be twice put in jeopardy for the same offense should be guarded with great care. The enforcement of this provision and its application "demand a test which is practical, not theoretical; it is the evidence, and not the theory of the pleader, from which the issue must be

determined." See 22 C.J.S. Criminal Law § 238, p.620.

In the case at bar, Defendant has been once tried. The jury was unable to reach a verdict and a mistrial was declared as a result of a hung jury. Defendant argues that it is the State which will assume a clear advantage at the second trial and that it should not be allowed to benefit from this circumstance by improving its position.

It is our opinion that the prohibition against double jeopardy is not to be applied against a background of possible tactical advantage. It provides a protection against governmental abuse of power but is not an available protection when there has been no such abuse. The purpose of the courts is to apply this constitutional guaranty so as to protect the individual from vexatious criminal prosecution but at the same time not to defeat the chief design of our penal laws, which have in view protecting society and preventing crime. 22 C.J.S. Criminal Law § 238, p. 620.

A retrial after a mistrial from a hung jury does not involve any sort of prosecutorial abuse. The inability of a jury to agree on a verdict can necessitate its discharge, making the completion of the trial an impossibility. Under these circumstances a second trial for the same offense is not barred, Such a trial would not violate the guaranty against double jeopardy. 22 C.S.J. Criminal Law § 260, p. 679.

> So, although there is some authority to the contrary, it is now generally held that the discharge of the jury, where after full consideration they fail to agree, and there is not reasonable expectation that they will be able to agree, is not a bar to another trial, for the reason that such condition of affairs constitutes absolute and urgent necessity and justifies the court in discharging the jury; the dismissal or discharge of a jury on this ground does not acquit accused of the crime charge, or discharge him.

22 C.J.S. Criminal Law § 260, p. 680-681.

We fail to be convinced by Defendant's argument. It is apparent that under these specific circumstances Defendant has not been and will not be placed in double jeopardy by

undergoing a second trial. It is equally apparent that although advantages may be gained by the State in discovery this does not contravene the process that is due to the Defendant. Otherwise, the passage of time between trials has created equal opportunities for both prosecution and defense to establish and to perfect their best arguments. In this respect, we do not see that either side is being afforded an unfair advantage for purposes on the upcoming trial.

The Defendant has argued to this Court that its witness, Dr. Michael Mandel, who testified during the first trial relative to his diagnosis of the Defendant, be allowed to testify in a similar manner during the course of the second trial. The State seeks to limit Dr. Mandel's testimony at the second trial.

Basically, we agree with the earlier Order prohibiting Dr. Mandel or any other medical or psychological witness from repeating Defendant's version of the shooting. It is our opinion that Dr. Mandel may testify but that he may not recite that which Defendant stated unless the State opens up such testimony on its cross-examination. Dr. Mandel will be allowed to draw his own conclusions but he will not be allowed to testify as to the credibility or believability of the Defendant's version of the events in question. See State v. Brodniak, ___Mont.____, 718 P.2d 322 (1986). However, he will be allowed to testify about the reasons he holds for thinking that his tests and analysis of the Defendant are valid.

It is further our opinion that the rules of discovery apply in this instance because Dr. Mandel relied to at least some extent upon reports and statements made by Drs. Muscatel and Marks in his own testimony. We base our opinion upon § 46-15-323(6), M.C.A. which provides that upon a showing of substantial need in the preparation of his case, the prosecution can move the Court to order the requested and necessary material or information be made available to him.

> The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the Court requires otherwise. The expert may in any event be required to disclose the

underlying facts or data on cross-examination. Rule 705, Mont.R.Ev.

In this instance, Dr. Mandel's testimony revealed that he used to some extent, materials provided by both Dr. Muscatel and Dr. Marks in forming his opinion. It is our ruling that these materials are discoverable and the State's motion is granted on this basis.

The motion to allow testimony on behalf of the State by Dr. Paul Bach has been reviewed by the Court. It is our understanding that Dr. Bach's psychiatric examination was conducted for sentencing purposes. When Defendant's guilty pleas was rejected the Court ordered that this evaluation be sealed. It is our opinion that this examination falls squarely into the ambit of Rule 410, Mont.R.Ev., to exclude from evidence at trial all statements and matters pertaining to or arising from the plea bargain process. Since Dr. Bach's testimony arises from circumstances surrounding a plea bargain, it is our decision that this testimony must be excluded.

We will, however, permit the State to have a psychiatric examination conducted relative to this Defendant. We do this because it is apparent that the Defendant is in effect offering an affirmative defense closely if not entirely similar to that of a mental disease or defect. The briefs of the Defendant as well as the record demote a position that, in short, asserts a structural and functional inability of the Defendant's brain and mind to form the requisite mental states that must under our law accompany acts before they be termed a crime. The State may not, in this examination, inquire into the event in question. Although the State will be precluded from interviewing about the event, it may conduct tests bearing upon the underlying psychological or medical conditions used as a basis for the defense.

Further, it is our decision that the State may use testimony from both Drs. Stratford and Walters, but it may not include in that testimony the results of any questions that were directed to the Defendant. Testimony may include any unsolicited remarks or statements made by Defendant and

any observations made by either of these doctors. No Miranda warnings were given by the doctors prior to or during the course of their interrogation. Thus, the Court is restricting their testimony to observations and unsolicited remarks outside the protection given by Miranda.

There is a motion pending before this Court to preclude, at trial, the testimony of jailhouse witnesses who were, at one time or another, cellmates or co-inmates of Defendant's in the Missoula County Jail. Defendant argues that there is a substantial likelihood that any reported hearsay "admissions" of this Defendant, made by these potential witnesses, would be highly inaccurate.

It is our opinion that the State should be allowed to call such witnesses and the Court so rules with the caveat that the Court listen to the testimony of each of these potential witnesses in Chambers before he takes the stand and that the Court shall then determine on an individual basis which of these witnesses shall be allowed to give testimony in open Court before a jury.

The Court recognizes that an accumulation of such witnesses carries with it its own prejudice and that the motivation for fabrication of testimony can run extremely high in circumstances such as these. We will not permit the State to parade a collection of these witnesses across the courtroom under any circumstances and we will be strict in our assessment of which testimony will be allowed.

There is a motion requesting that the Court grant a greater number of peremptory challenges to the Defendant in this case given the notoriety of this particular matter. On this issue, we are going to reserve any ruling until the time of trial when it should be evident whether Defendant's speculations as to pre-trial publicity and prejudice actually materialize. If it is necessary at that time, it should be understood that it is inherent in the Court's power to control and, we maintain, in appropriate measure to expand the number of peremptory challenges when required to assure a fair trial.

As to voir dire, we are allowing counsel to propose a number of questions, touching on sensitive issues, which will

be posed to the general panel. Any juror who responds to such questions in a manner inappropriate for further interrogation in a general voir dire will be examined individually with respect to these specific questions. The questions counsel intend to pose should be submitted to the Court one week prior to trial.

A much disputed issue has been the question of whether the Court should allow Instruction G be given to the jury.

The State has moved this Court to strike portions of Instruction G relating to the definitions of "purposely" and "knowingly" from further proceedings in this cause. Defendant asks that the Court issue Instruction G to instruct the jury on the mental elements of the crime of deliberate homicide.

The instruction given in the first trial provided, in part, that deliberate homicide requires proof that the defendant acted "with the knowledge that he was causing or with the purpose to cause the death."

The Montana Supreme Court has rejected the contention that the jury be instructed that the defendant intended to cause death as a result of his action. The Court noted that a defendant could properly be convicted of deliberate homicide even though he may not have intended that the death result from the act where he contemplated "the same kind of harm or injury to the victim." State v. Sigler, ___Mont.___, 688 P.2d 749, 753-55 (1984). It appears that the holding in Sigler made it clear that it is not the law the State must prove defendant caused the death with the knowledge that he was in fact causing it or with the purpose to cause the death, Sigler, supra, at 756-68.

The Defendant argues that the jury should be instructed with more than the statutory definitions and Montana criminal jury instructions and that Instruction G be provided to them for their consideration throughout deliberation.

Defendant has cited us to a text on criminal law which states that:

> The modern view is to limit 'intent' to instances where it is the actor's purpose to cause the harmful result, and the word 'knowledge' is

> used to cover instances in which the actor knows that the harmful result is substantially certain to occur. In a criminal code utilizing such definitions, what is here called intent-to-kill murder may be described as intentionally or knowingly killing another. Apart from the question of when capital punishment should be permitted, there is 'no basis in principle for separating purposeful from knowing homicide'. Many of the modern codes do not distinguish between them.[9] f.n.9 Mont. Code. Ann. 45-5-102

2 LaFave & Scott, Substantive Criminal Law, § 7.2, p. 191-192.

The citation to the Montana Code Annotated concerns the statute relative to deliberate homicide.

> (1) Except as provided in 45-5-103(1), criminal homicide constitutes deliberate homicide if:
>
> (a) it is committed purposely or knowingly;

§ 45-5-102(1)(a), M.C.A.

However, it is our position that the Montana legislature intended that a distinction exist between purposeful and knowing homicide. Otherwise the definition of terms found at § 45-2-101, M.C.A., which include separate and distinct definitions for "knowingly" (§ 45-2-101(33), M.C.A.) and "purposely" (§ 45-2-101(58), M.C.A.) would not have been necessary to our criminal code. It is clear that:

> A person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware of his conduct or that the circumstance exists. A person acts knowingly with respect to the result of conduct described by a statute defining an offense when he is aware that it is highly probable that such result will be caused by his conduct. When knowledge of the existence of a particular fact is an element of an offense, such

> knowledge is established if a person is aware of a high probability of its existence. Equivalent terms such as 'knowing' or 'with knowledge' have the same meaning. (Emphasis added.)

§ 45-2-101(33), M.C.A.

The language of the statute requires an awareness on the part of the Defendant. He must be aware of the physical events surrounding him during the critical moments. Awareness is measured by a subjective standard which goes more to perception than to motivation.

In this instance, Defendant is claiming that his state of intoxication at the time of the criminal act precluded any ability on his part to act deliberately. Defense argues that whatever acts he may have committed, he did while in such a chaotic state of mind as to amount to a showing of mitigation. Defendant contends that he was so greatly intoxicated on the night of the offense, as well as suffering from such severe mental and emotional stress, that he did not act with the requisite purpose or knowledge to commit deliberate homicide.

> A person acts purposely with respect to a result or to conduct described by a statute defining an offense if it is his conscious object to engage in that conduct or to cause that result. When a particular purpose is an element of an offense, the element is established although such purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense. Equivalent terms such as 'purpose' and 'with the purpose' have the same meaning. (Emphasis added.)

§ 45-2-101(58), M.C.A.

Once again, the language of the statute is setting forth a subjective standard to be determined by the jury in its deliberation of whether Defendant acted purposely.

Defendant appears to be attempting to exclude himself from the requirement of "knowledge" and to restrict the crime of deliberate homicide to one requiring only purpose. He then

argues that due to stress and intoxication he did not act with either purpose or knowledge in committing any acts at issue on the night of this offense.

> A person who is in an intoxicated or drugged condition is criminally responsible for conduct unless such condition is involuntarily produced and deprives him of his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. An intoxicated or drugged condition may be taken into consideration in determining the existence of a mental state which is an element of the offense.

§ 45-2-203, M.C.A.

It is argued that Defendant's stress and intoxication tend to show mitigation of the crime charged.

> Criminal homicide constitutes mitigated deliberate homicide when a homicide which would otherwise be deliberate homicide is committed under the influence of extreme mental or emotional stress for which there is reasonable explanation of excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a reasonable person in the actor's situation.

§ 45-5-103, M.C.A.

It is clear that a determination of "mitigation" is a jury question in which the jury determines the reasonableness of the explanation from the standpoint of a reasonable person in Defendant's circumstance.

Negligence also carries with it standards which are objective.

> A person acts negligently with respect to a result or to a circumstance described by a statute defining an offense when he consciously disregards a risk that the result will occur or that the circumstance exists or when he disregards a risk of which he should be aware that the result will occur or that the circumstance exists. The risk must be of such a nature and degree that to

> disregard it involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation. 'Gross deviation' means a deviation that is considerably greater than lack of ordinary care. Relevant terms such as 'negligent' and 'with negligence' have the same meaning. (Emphasis added.)

§ 45-2-101(37), M.C.A.

It is clear that the definitions of "purposely" and "knowingly" contain standards which are largely subjective. The awareness required under "knowledge" is a subjective measure which goes to Defendant's perception. The jury must confront a different subjective standard when it considers "purpose." There, the question is, "Was it Defendant's conscious object to engage in that conduct or to cause that act?"

While it is true that there may be many grounds upon which a defendant could argue that such standards cannot be fairly applied to him because of personal psychology or characteristics or culture, the possibility that these standards will apply to any one of us, who are each governed by the same code, is a risk that we each bear simply by being a part of a particular body politic.

Therefore, the Court rejects the proposition that Instruction G should be submitted.

The State has before the Court a Motion to Produce pursuant to § 46-15-323, M.C.A., asking that the Court direct Defendant to produce:

> 1. A list of any witnesses not called at the first trial which the Defendant intends to call at the second trial.
> 2. All statements made by any witness the Defendant intends to call if such statement was not generated by the State or made in open Court.
> 3. The results of any physical examination, scientific tests, experiments or comparisons, including all written reports and statements in

connection with this case done by or relied upon by any expert the Defendant intends to call at the second trial.

4. If not included above, a list of all papers, documents, photographs, and other tangible objects the Defendant will use at the second trial, and which were not introduced into evidence at the first trial.

It is our opinion that at this juncture in the proceedings the granting of such motion would not violate Defendant's constitutional rights. Defense counsel has argued that a California court recently held that statutorily mandated discovery against the defense was unconstitutional under the self-incrimination clause of the California constitution. In re Misener, 698 P.2d 637 (1985). We agree that the Montana constitution's drafting history indicates a liberal approach to guarantees of individual rights.

The Court in Misener cited authority stating that:

"the privilege forbids compelled disclosures which could serve as a 'link in a chain' of evidence tending to establish guilt of a criminal offense; in ruling upon a claim of privilege, the trial court must find that it clearly appears from a consideration of all the circumstances in the case that an answer to the challenged question cannot possibly have a tendency to incriminate the witness."

Misener, supra, at 646.

It is our opinion that the State's request for a witness list and for tangible objects Defendant intends to use at this second trial does not constitute a violation of Defendant's constitutional rights and it does not have a tendency to incriminate the Defendant. We have previously ruled that the State has the right to discovery relative to the results of examinations and tests and do not find the granting of this request in any way abridges Defendant's rights. With respect to statements made by the witnesses, the Court reserves ruling on this issue until it has been provided the opportunity to review such statements and to judge whether they have a

tendency to incriminate the Defendant.

There has been much argument as to whether this Court should exclude reference to Defendant's Alcohol Treatment Records.

Judge Olson, in an earlier ruling, judged that these documents were privileged under § 53-24-306, M.C.A. All records were examined by Judge Olson in camera and those records which he deemed relevant to trial were provided to the prosecution.

The State now argues that when Defendant contends that his alcoholism is an issue which negates a requisite state of mind necessary to be convicted of deliberate homicide, then all evidence relative to his alcoholism is relevant and admissible. The State asserts that the Court must not only consider § 53-24-306, M.C.A., and its provision for privilege, but that it must also consider Rule 503, Mont.R.Ev. and the instances in which a privilege is considered as having been waived. Further, it is the State's position that this privilege goes to the treating physician or to defense counsel but that it cannot be extended to an expert whose function is to render an opinion as to Defendant's ability to possess a certain state of mind. The State asks that it have access to all records for purposes of rebuttal or, in the alternative, that it exclude all such material from the case.

Defendant contends that Judge Olson's order was issued in compliance with both state and federal law. Defendant cites the Court to State v. Mendenhall, ___Mont.___, 721 P.2d 1255 (1985) and to 42 C.F.R. §§ 2.63 and 2.65.

The Court has determined that the previous order entered was entered properly. We agree to review the records at issue prior to the second trial and to modify the order now standing if necessary.

The Court requests counsel to notice up for hearing matters of clarification of this Order or the Court's failure to rule on pending motions.

DATED this 4th day of May, 1987.

JAMES B. WHEELIS
District Judge

APPENDIX E

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. 88-038

STATE OF MONTANA,	*	
Plaintiff and Respondent,	*	
v.	*	**ORDER**
FRED DANIEL VAN DYKEN,	*	
Defendant and Appellant.	*	

* *

The petition for rehearing is denied.

DATED this 25th day of May, 1990.

J. A. Turnage
Chief Justice

Diane G. Barz

John Conway Harrison

John C. Sheehy

R. C. McDonough

Fred Weber

William E. Hunt, Sr.
Justices

APPENDIX F

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. 88-038

STATE OF MONTANA,
Plaintiff and Respondent,
v.
FRED DANIEL VAN DYKEN,
Defendant and Appellant.

PETITION FOR REHEARING

Defendant through counsel respectfully petitions this court, pursuant to M.R.App.P., Rule 34, for a rehearing on the following issues in this appeal:

(1) Whether instructing a jury in accordance with the parameters set forth in State v Sigler, 688 P.2d 749 (Mont. 1984), on the mental element of deliberate homicide, effectively establishes an unconstitutional presumption of intent within the meaning of Sandstrom v Montana, 442 U.S. 510 (1979)?

(2) Whether the double jeopardy clause of the Federal Constitution places any constraints on the State's exploitation of the exposure of the defense case at the first trial — which was terminated by a hung jury — to enhance its position at the second trial?

GROUNDS FOR THE REHEARING

1. Jury Instruction violating Sandstrom: Since the beginning of this case, and especially since the conclusion of the first trial in September, 1985, the constitutional propriety of Sigler-type instructions concerning the mental element of the crime of deliberate homicide has been at issue. During its deliberations at the first trial, District Judge Thomas Olson provided the jury with a supplemental instruction on the

mental element required to be proved in a deliberate homicide case ["Instruction G"], which required that the jury find the defendant acted "with the knowledge he was causing or with the purpose to cause the death," before it could find him guilty of deliberate homicide. This seemingly straightforward interpretation of the Montana homicide statute — taken verbatim from the 1983 Montana case State v Weinberger, 665 P.2d 202, 207 — was vigorously opposed by the State when it was again offered by the defense before the second trial. After elaborate briefing and argument, trial Judge Wheelis, relying explicitly on State v Sigler, refused the offered Instruction G as not being in accordance with Montana law, and as not being required by anything in the federal constitution. He then gave what were in essence two modified Sigler instructions on mental state.

In both his opening and reply briefs in this appeal, defendant, among other things, has specifically argued that instructing a trial jury in a deliberate homicide case in accordance with Sigler violates the federal due process clause as interpreted in Sandstrom v Montana. See, Opening Brief, pp. 59-60; 65-66; 67; Reply Brief, pp. i (Table of Contents, Argument V); 19-21. The argument, in essence, is that Sigler-type instructions operate as the functional equivalent of the presumption-of-intent instructions which the U.S. Supreme Court found unconstitutional in Sandstrom.

In its May 3, 1990, Opinion on this appeal, no mention of this issue or this contention is made by this Supreme Court [See Opinion, 24-25]. Sandstrom is never alluded to, nor is the defense argument that Sigler-type instructions violate the federal due process clause either mentioned or addressed. Thus, it appears that a constitutional question "decisive of the case submitted by counsel, was overlooked by the Court," M.R.App.P., Rule 34. To say, as the Court does, that "we once again affirm the Sigler holding" [Opinion, p. 25] certainly implies that this Court perceives no federal constitutional infirmity in Sigler-type instructions. But since the issue was specifically — and quite exhaustively — discussed in the defense appeal briefs, and since it is crucial to the outcome of the appeal, a rehearing should be had. This will enable this

Court specifically to consider and address the issue of a federal due process violation committed by the trial judge in refusing Instruction G, and giving the Van Dyken jury Sigler-type mental state instructions.

2. Double jeopardy and changes in position between the first and second trial: Well before the second trial commenced, the defense moved in limine to obtain orders which would, in essence, have limited the strategic and tactical advantages to be gained by the State from its experience of the first trial, and particularly from the full exposure of the defense case therein. After full briefing and argument, the trial Court rejected the defense position, holding, in essence, that the federal due process clause imposes no constraints on the degree to which the State can exploit its experience of a full trial terminated by a hung jury, in attempting to obtain a conviction at the defendant's retrial.

In the defense appeal briefs, this trial court ruling is specifically raised as federal constitutional error mandating reversal of defendant's conviction at the second trial, see, Opening Brief, pp. 31-39; Reply Brief, pp. 3-6. Specifically, the defense contended on appeal that it was illegitimate to exclude both Instruction G and the crucial part of the defense psychiatrist's testimony from the second trial, when both these things had been specifically identified by the Prosecutor in open court during a pretrial hearing as the only two factors which had "prevented obtaining a conviction" at the first trial (Opening Brief, pp. 37-38).

In its May 3, 1990, Opinion, this Supreme Court seriously misconstrued defendant's argument. It interprets the motion in limine as having been based on the contention that a mistrial had been declared without manifest necessity at the first trial (opinion, 13). This motion in limine, however, was made on the assumption that a mistrial had been properly granted at the conclusion of the first trial. For if it had been granted without manifest necessity, no second trial could have taken place at all, and no motions in limine would ever have had to be made. The defense contention — at trial level and on appeal — was that the double jeopardy clause simply prohibits the State from identifying elements of a prior trial

that in its view "prevent the jury from convicting," and then systematically eliminating them by pretrial motion before the retrial. It would seem that in misconstruing an important appeal argument, this Court in effect "overlooks ... a question decisive of the case submitted by counsel," and should rehear the question and consider the actual argument made, not a "straw man" version.

IMPORTANCE OF DECIDING THESE QUESTIONS

When issues of federal constitutional law are raised and clearly presented at all stages of a State criminal proceeding, it is only fair that they be clearly addressed and explicitly decided by this Court. To do otherwise is needlessly to cloud the litigation, and cause needless expenditure of human and fiscal resources to clarify the issues at later stages of the proceedings, if any.

RESPECTFULLY SUBMITTED this 9th day of May, 1990.

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APPENDIX G

INSTRUCTION NO. 10

In order to reach a verdict in this case, it is necessary that you consider the crime of deliberate homicide first, and that all twelve of you find the defendant either guilty or not guilty of that charge.

In the event you find the defendant guilty of deliberate homicide, you need go not further as you will have reached a verdict.

In the event you find the defendant not guilty of deliberate homicide, you must then consider the lesser offense of mitigated deliberate homicide. All twelve of you must find the defendant guilty or not guilty of this charge.

If you find the defendant guilty of mitigated deliberate homicide, you have reached a verdict, and you need proceed no further.

If you find the defendant not guilty of mitigated deliberate homicide, you must then consider the lesser offense of negligent homicide. All twelve of you must find the defendant guilty or not guilty of this charge. When you have done so, you have reached a verdict, and you need proceed no further.

Whenever you have reached a verdict which does not require you to proceed further, you should contact the bailiff to return you to open court.

The jury will bear in mind that the burden is always upon the prosecution to prove beyond a reasonable doubt every essential element of any lesser offense which is necessarily included in the crime charged in the information.

Given:

_____

J. B. WHEELIS
District Judge

APPENDIX H

INSTRUCTION NO. JI-13

The crime of deliberate homicide includes the lesser crimes of mitigated deliberate homicide and negligent homicide. You may find the defendant guilty of one of the lesser crimes only if (1) some of you are not convinced beyond a reasonable doubt that the defendant is guilty of deliberate homicide, and (2) all twelve of you are convinced beyond a reasonable doubt that the defendant is guilty either of mitigated deliberate homicide or negligent homicide.

When you deliberate, you should first consider the charged offense, and, if you cannot agree on a verdict on the charged offense, you should then consider the lesser included offenses.

Refused - JBW

Source: Paragraph 1: Ninth Circuit Model Jury Instructions, No. 3.03 (West 1985)
Paragraph 2: Oregon UCrJI No. 1009: see, State v. Allen, 717 P2d 1178, 1179-81 (Oregon 1986)

If the defendant requests this form of lesser included instruction, it is error not to give it. Allen, supra, 717 P2d at 1179; U.S. v Jackson, 726 F2d 1466, 1469 (9th Cir 1984)

Defense No. JI-13

INSTRUCTION JI-14A

The law permits the jury to find an accused guilty of any offense which is necessarily included in the crime charged in the information, whenever such a course is consistent with the facts found by the jury from the evidence in the case and with the law as stated by the Court.

The offenses of mitigated deliberate homicide and negligent homicide are necessarily included in the charge of deliberate homicide.

So, in this instance, with respect to the offense charged, deliberate homicide, if you should find the accused not guilty of that offense, or if you cannot unanimously agree that the defendant is guilty of that crime, then you should proceed to determine the guilt or innocence of the accused as to any of the lesser offenses which are included in the crime charged.

You should bear in mind that the burden is always upon the prosecution to prove beyond a reasonable doubt every essential element of any offense included in the charge.

Refused - JBW.

Source: Seventh Circuit Criminal Jury Instructions, No. 2.03 (West 1980), (3rd Para.);
Pattern JI's, 5th Circuit, #8 p47 (West 1983) (1st and 2nd para.);
MCJI, No. 1-011 (last para.).

Defense No. JI-14A

APPENDIX I

TRANSCRIPT: TRANSITION INSTRUCTION SETTLEMENT CONFERENCE

June 24, 1987:

THE COURT: Any objection to State's proposed 3, which I have modified to include a consideration of negligent homicide? Any objection by the State to my adding the consideration of the lesser offense of negligent homicide?

MR. DESCHAMPS: Yes, Your Honor. We don't believe there has been any testimony discussed in this trial that raises the issue of negligent homicide, and therefore, we don't feel the Court should instruct on it.

THE COURT: Any objection by the defense?

MR. BOGGS: Yes, Your Honor. According to State v. Allen, 717 P.2d 1178, an Oregon 1986 case, and United States v. Jackson, 726 F.2d 1466, a Ninth Circuit 1984 case, when the defense requests an unable to agree instruction, rather than an acquittal first instruction such as the Court proposes to give, it has been held that the Defendant is entitled to an unable to agree instruction.

That instruction would entitle the jury to go on to the consideration of the lesser offense without first finding a unanimous verdict of not guilty to the principal offense. It would allow them to, if unable to agree on a verdict on the principal offense, go ahead and consider the lesser offenses.

These two cases hold that the defense is entitled to an instruction like that. The reason, simply put, is that it is less coercive to the jury in terms of their deliberation on the principal offense.

In this case it also is more consistent with the Court's mitigated deliberate homicide burden of proof instruction, we feel.

THE COURT: I do not — having read your authorities, I don't think that the reasoning of the courts that you mention — those authorities, the authorities you just mentioned, reach

constitutional grounds. Logically speaking, if the jury is unable to decide on the principal charge, but can decide on the included charge, it effectively acquits of the greater charge. It has to, regardless of which verdict they arrive at. If they arrive at guilty of the lesser, they acquit on the greater — if they arrive at acquittal of the lesser —

If the jury in the case is deadlocked, I may well, though, inquire on this issue. I don't want at this stage to give them this instruction, understanding it is within the discretion of the Court to either way. The reason I am not is, it is not consistent with logic to do so. But you recognize there are often simple emotional grounds for the jury's decision that have nothing to do with logic. So I am willing to inquire later on. We'll see what happens.

Now, I am going to give 10 as I have offered.

[End of partial transcript]

APPENDIX J

TRANSCRIPT OF DEFENSE PSYCHIATRIST'S TESTIMONY CONCERNING DEFENDANT'S VERSION OF THE SHOOTING EVENT - FIRST TRIAL

September 19, 1985:

MS. BORG: Okay. Do you understand that anything else happens of significance in Fred's life on about November 30, 1984?

DR. MANDEL: Yes.

Q. And what is that, please?

A. Well, he again impulsively breaks into his friend Chris' house and steals a number of Chris' possessions, kind of in an attempt to — a couple of attempts, one is to get enough money to buy some alcohol, but also he takes Chris' gun, a .357 Magnum and the idea that he has kind of loosely formed in his mind at that time is that he's going to get enough money together to get himself just absolutely stinking drunk and then he's going to kill himself. He's going to shoot himself with this gun.

Q. What do you understand that he does with the checks from the checkbook?

A. He told me that he tried to cash a number of checks while still in Great Falls; that he successfully did so. I don't know how many, but perhaps three or four checks for $10.00, $15.00 each, just again to get him some money to buy booze.

THE COURT: I'm going to remind the jury that that testimony has been admitted only for the purpose of showing — well, offered by the State, I guess to show motive, opportunity, plan, knowledge, identity, absence of mistake or accident and here offered by the Defendant for, I guess, similar purposes and it's not to be — the Defendant is not to be convicted on the charge presently before you just because of the use of bad checks.

BY MS. BORG:

Q. Did Fred have any other source of income at the end of 1984?

A. He discovered to his surprise that he was owed some money by a magazine subscription company that he worked for in the summer. He runs to his ex-boss' and is told that there is a series of checks for about $90.00 waiting for him, which for him at that time is a lot of money and he, over the next several days, collects and cashes those checks.

Q. Do you know what he does with the money from those checks?

A. Well, my understanding from speaking to him is that he used it to buy alcohol.

Q. Did you have the opportunity to explore with Fred any of the details following either the theft of the automobile or the theft of the checks in terms of an investigation of those thefts?

A. Yes. On December 5th after having been out the night before drinking again until 4:00 or 5:00 in the morning, he was called at about 9:00 o'clock in the morning by a Detective McQuire from the Great Falls Police Department and Detective McQuire apparently told him over the telephone that he had been seen with Chris Tigart's gun and that he had been seen cashing Chris Tigart's checks and he was, I think, told to come down to talk with the Detective. I think his state of mind at that time is underlined by his spontaneous response as he described this to me. He said this really upset him and the first thing he did was to take a drink. So he had a beer at 9:00 o'clock in the morning after having just awakened by the telephone. This is again typical of a deteriorating alcoholic. The only kind of response they have to anything is to drink and —

Q. I'm sorry, Doctor.

A. I was finished.

Q. Did he respond to Detective McQuire's invitation to come down and talk?

A. No. As I understand it, he decided that he would try to put everything right, and in talking with Chris Tigart, this

verified the story that I got from Fred Van Dyken. He then proceeded down to the place where Chris worked and told Chris that he would put everything right and he would get back the — he apparently took a lock, Chris's wife's billfold, some checks as well as the gun and some bullets, and Chris said that — "Okay. You have to do that," but in order to make it right, Fred then proceeded to commit a wrong by taking a car, Josie's car again to do this.

He had thrown some of these items outside into a ditch around Lincoln, and so he was going to drive out to Lincoln, find this stuff, bring it back, give it back to Chris. That was his idea to setting it right. He does not go down to talk to Detective McQuire. At the same time he told me that he reckoned the best thing to do was to put the gun and the checkbook in the car to take with him so he'd have it all to give to Chris when he returned.

MS. BORG: Your Honor, would this be a good time to take a recess before we —

THE COURT: We'll take a short recess here. Remember the admonition not to discuss this case among yourselves or with other persons. Do not form or express an opinion about the case until it's been finally submitted to you. You may step down.

[Whereupon, a recess was taken]

BY MS. BORG:

Q. Doctor, in your —

THE COURT: Wait a minute. Your client's missing.

Let the record show the Defendant is personally present with counsel. The jury is present.

Okay.

MS. BORG: Thank you, Judge.

BY MS. BORG:

Q. Doctor, what did Fred intend to do with the gun when he took it?

A. Well, it's pretty clear that at the time he took the gun, he told me he wanted to commit suicide. He had made several suicide attempts earlier in the fall and the summer and one of them in late November just really a few days before —

around Thanksgiving, he was found by his mother on the floor of his room unconscious and she covered him with a blanket and let him —

MR. Mc LEAN: To which I object, nonresponsive.

THE COURT: Sustained.

BY MS. BORG:

Q. Did you have the opportunity to discuss any prior suicide attempts with anyone?

A. Yes.

Q. And how many attempts did you learn there had been?

A. I learned there were at least three.

Q. And when was the most recent of those attempts?

A. Around Thanksgiving 1984.

Q. And who did you obtain the information concerning that attempt from?

A. Fred Van Dyken.

Q. Did you speak with anyone else about it?

A. I did, but I can't recall who that was.

Q. Now, turning your attention again, Doctor, to December 5, 1984, what was your understanding with regard to Fred's attempt to recover the stolen items to return to Chris Tigart?

A. Well, he took Josie's car again and drove out to where he thought he had thrown these items and —

Q. Was he able to locate the items?

A. No. It had snowed and he couldn't find where they were. He decided, rather impulsively after stopping in a bar, to continue on to Missoula.

Q. What did you discover motivated him to go to Missoula?

A. Well, initially it was he heard that there was a rock concert, a Stills and Nash concert and he thought that would be a good idea to go see that or hear it.

Q. What do you understand he did when he got to Missoula?

A. Well, he looked up his friends who he had been

drinking with several days earlier when he had driven to Missoula, and he posed a possibility to them that they would go to this concert and they didn't want to go and he very quickly and very typically of a dependent personality, change his mind. What he really wanted to do was to drink.

Q. Doctor, do you know the names of the people he contacted in Missoula?

A. I've heard the names, but I can't recall what they are.

Q. Would they be Tim and Jeff Braida?

A. Yes.

Q. With regard to Fred and the Braidas, what do you understand happened that night?

A. Well, as much as he could — Fred could recall they spent the night drinking. They were in several bars. They picked up, I think one of the Braidas who was working at a supermarket. They went out to Pattee Canyon and had a drink or two. They were more or less drinking and driving and bar hopping during that time.

Q. Did Fred tell you anything about his drinking on the way to Missoula that day?

A. He was drinking as he drove that day. He stopped and had drinks in a bar in Lincoln and he also had some beer with him as he was driving.

Q. What do you understand to be the events —

A. THE COURT: Could I see counsel at the bench, please?

[Whereupon, the following proceedings were had at the bench, outside the hearing of the jury.]

THE COURT: As an expert, he won't be permitted to testify as to what other people have told him except the Defendant.

MS. BORG: I understand.

THE COURT: You're getting to a critical area. Be sure you elicit what he got from the Defendant, or it's very confusing.

MS. BORG: Thank you, Judge.

[Whereupon, the following proceedings were had in the hear-

ing of the jury.]
BY MS. BORG:

Q. Have you had an opportunity to discuss the events of the evening of December 5th and the early ours of December 6th with either Tim or Jeff Braida?

A. No.

Q. Do you take your information of the happenings of that night solely from Fred?

A. Yes, that's right.

Q. And with regard to the information, are you aware of when Fred may have taken the Braidas home that night?

A. Well, not exactly. He mentioned that he was nodding off during the evening; that his memory for the evening and the early morning of the 6th was not good, but he did recall that he had dropped them off at about 2:00 o'clock in the morning, something like that, in that neighborhood and was planning to drive his car and park it and fall asleep, despite the fact it was quite cold out that night.

Q. He recalls dropping the Braidas off?

A. Yes.

Q. Does he report to you remembering other events of the evening?

A. The next thing he reported to me, and I went over this very carefully with him repetitively. The next thing he remembers is flashing lights from a patrol car behind him and the figure of a police officer coming toward his car with his hand on his gun or maybe taking his gun out and then — would you like me to continue this brief description? It's very brief.

Q. Please do.

A. Then his words are: "I'm splitting. I'm getting out of there. All hell is breaking loose, and I throw one over my left shoulder," referring to a shot over his left shoulder as he accelerates away from the scene with the flashing lights and the Officer coming towards him.

Q. Does he report recalling anything between the time he dropped the Braidas off and the flashing lights?

A. No, he does not recall.

Q. Did you discuss in detail with him the brief description you just gave us?

A. Yes.

Q. Did you learn more about what was happening in Fred's mind at that time?

A. No, no. This was the sum total of what he could report and recall. It was a startle situation, a moment of panic and just a feeling that he had to get out and that he did accelerate the car to remove himself from the situation.

Q. Now, Doctor, you have given a great deal of factual information that you have learned from lots of different sources. Based upon that, based upon what Fred told you about the events, flashing lights and the panic, have you been able to form an opinion with regard to his mental state at the time he threw one over his shoulder?

A. Yes, I have.

Q. And what is that opinion, please?

A. Well, in my opinion, he was in an extremely disordered mental condition at that time. He was being impacted by all of these stresses that I mentioned and plus the fact that he'd been drinking very heavily and in my opinion, he was unable to conclude with any kind of thought that he was going to kill an officer. He was just beyond his ability to think clearly to do that, and also I concluded that he was unable to realize the consequences of any kind of actions that he would be taking at that time. He didn't really have the knowledge of what would really happen if he were to — well, in responding to what he did.

[End of partial transcript]

APPENDIX K
TRANSCRIPT OF COURT - COUNSEL COLLOQUY CONCERNING PSYCHIATRIC TESTIMONY

Hearing, October 11, 1985:

THE COURT: The obvious question is why should the Defendant be permitted to stand behind an expert, that doesn't show the Court's view in any of this, but why should the Defendant be permitted to stand behind the testimony of an expert who has examined the Defendant, has rendered his professional opinion as his inability to have a requisite state of mind and then the State not be able to offer testimony combatting that, again, based on the examinations of the Defendant?

MS. BORG: Let me bifurcate my answers to that. First of all, I think that the State had, in Livingston, and would have, again, adequate availabilities through cross-examination, the possibility of impeachment and the traditional safeguards available to them to deal with the psychiatrist, his process, his findings, his credibility and that just because it's an area of expertise, that that alone should not force us into a situation that every time the Defendant does something, that we're compelled to make the Defendant available for the State to be able to do the same thing.

THE COURT: Well, it's — not to jump in on you here, but it's one thing to offer up testimony based upon a body of evidence that is available to all, then each side could call whatever witnesses they wanted to and offer conflicting opinions; but what about where that evidence is only available to one party and the State can't get at that evidence without a court compelled examination?

MS. BORG: I think, Your Honor, that the State did have the availability of that information and that evidence, again, in their cross-examination of Dr. Mandel, he told the Court, the jury, the prosecution, what his process was, what his interview was, what information he had obtained, that evidence used as the basis of his opinions, what formed that.

All of that information that was germane to his testimony was put before the court, again subject to cross-examination, rebuttal, and I'm sure was tested through Dr. Stratford listening to that evidence.

THE COURT: And the State did not object to that, some of that testimony coming in, either apparently under the view that it would help them —

MS. BORG: I think that Dr. Mandel gave a true and complete rendition of what his findings were to the Court and to the State, and they were able to make use of that in, again, the traditional ways. Now, the —

THE COURT: With — Whether Dr. Mandel could describe the incident in question was never ever adequately tested in the trial in Livingston. It was not objected to and there was never any briefing and that matter never came to a head.

MR. DESCHAMPS: Your Honor, I don't mean to interrupt —

THE COURT: Well, don't interrupt, then, until I'm finished, please. And so we really don't know the extent. And because the Court was never forced to rule upon that —

MR. DESCHAMPS: Your Honor, I just want to say that I did object to the entire testimony of Dr. Mandel and asked that he not be allowed to testify at all.

THE COURT: I know you did, but that was because of notice and not on his rendition of the defendant's story, was it admissible or not admissible. Anything else?

[End of partial transcript]

APPENDIX L

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR MISSOULA COUNTY

* * * * * * * * * * * *

STATE OF MONTANA,	*	Cause No. 6877
Plaintiff,	*	Filed: 2/7/86
-vs-	*	D.N.# : 111
FRED DANIEL VAN DYKEN,	*	
Defendant.	*	

* *

STATE'S MOTION IN LIMINE TO LIMIT TESTIMONY OF DR. MANDEL

COMES NOW Robert L. Deschamps III, Missoula County Attorney and respectfully moves the Court for an order limiting the testimony of Dr. Michael Mandel to his opinion and the scientific reasons for it. Specifically the State requests that Dr. Mandel be prohibited from giving, in the form of hearsay, the Defendant's version of the crime.

The State's Motion is supported by the attached brief.

RESPECTFULLY SUBMITTED this 7th day of February, 1986.

_____

ROBERT L. DESCHAMPS III
Missoula County Attorney

APPENDIX M

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR MISSOULA COUNTY

* * * * * * * * * * *

STATE OF MONTANA,	*	Cause No. 6877
Plaintiff,	*	Filed: 2/7/86
-vs-	*	D.N.# : 112
FRED DANIEL VAN DYKEN,	*	
Defendant.	*	

* *

STATE'S MEMORANDUM IN SUPPORT OF MOTION IN LIMINE TO LIMIT DR. MANDEL'S TESTIMONY

At the first trial of this case the defense called Michael Mandel, M.D., a psychiatrist. Dr. Mandel stated a psychiatric diagnosis of the Defendant, and testified at length about the Defendant's version of the events leading up to and culminating in the shooting of Deputy Al Kimery.

A brief review of the direct examination of Dr. Mandel may be helpful to illustrate what occurred. After the usual qualifying testimony, on page 15 of the Mandel transcript (hereafter referred to as "Tr.") the following question was asked:

"Would you tell us the process of your evaluation or your time with Mr. Van Dyken?:

The next nineteen (19) pages lay out an exhaustive background picture of the Defendant. In rambling narrative answers Dr. Mandel describes the Defendant's school and employment history; his natural and adoptive family and his relationship to both; his social history, including a variety of relatively intimate details of relationships with the opposite sex; his history of alcohol and drug abuse, and more. This generalized background becomes more specific on Tr. p. 34, where the following is asked:

"Did you have the opportunity to inquire of Fred about

significant events during November of 1984?"

This question prompted a one and one half (1 1/2) page answer, but to elicit even more specific information on Tr. p. 36 defense counsel asks:

"Do you understand that anything else happens of significance . . . about November 30, 1984?"

At this point Dr. Mandel describes the Defendant's Great Falls burglary and theft of an automobile, a pistol, and a checkbook belonging to friends of his, and with this testimony launches into a ten (10) page description of the Defendant's version of the central facts of the trial. In effect Dr. Mandel testified as a surrogate defendant on these points. A summary of the questions asked illustrates this testimony:

Tr. 36 "What do you understand he does with . . . the checkbook?"

Tr. 37 "Did you . . . explore . . . any of the details following the . . . theft . . .?"

Tr. 40 "What did Fred intend to do with the gun?"

"Did you...discuss any prior suicide attempts...?"

Tr. 41 " . . . turning . . . to December 5, 1984 . . . what was your understanding with regard to Fred's attempts to recover the stolen items . . . ?"

"What . . . motivated him to go to Missoula?"

Tr. 42 "What . . . [did he do] when he got to Missoula?"

". . . What do you understand happened that night?"

Tr. 44 " . . . are you aware of when Fred may have taken the Braidas home . . . ?"

"Does he report . . . other events of the evening?" In response to this question Dr. Mandel related the Defendant's version of the shooting.

Tr. 45 "Does he report recalling anything between the time he dropped the Braidas off and the flashing lights?"

Finally at Tr. pg. 45, line 18, defense counsel asked virtually the first question in nearly 30 pages regarding "what was happening in Fred's mind at that time," whereas ostensibly the entire purpose of Dr. Mandel's testimony was to discuss the Defendant's state of mind — not to give the Defendant's testimony for him.

For the reasons set out below the use of Dr. Mandel to give the Defendant's factual version of what happened was improper, and should be prohibited at the second trial. The basis for this conclusion can be simply stated. Dr. Mandel's testimony was hearsay and was not admissible under any exception to the hearsay rule. Furthermore, under the circumstances present here it is unjust and prejudicial to allow the testimony in under Rules 703 and 705, Montana Rules of Evidence (hereafter merely referred to by Rule number).

Rule 602 provides that "a witness may not testify as to a matter unless . . . he has personal knowledge of the matter." Obviously Dr. Mandel did not have personal knowledge of the events he described. Rather he was merely recounting the Defendant's knowledge as related to him. The recounting of another person's statement of events, as the other person observed them, and offered to prove the truth of the events described is hearsay as defined by Rule 801(c). Unless there is an applicable exception, hearsay is not admissible. Rule 802. The only traditional exception having relevance here is the Rule 803(4) exception, which allows witnesses to recount hearsay "statements made for the purposes of medical diagnosis or treatment . . . insofar as reasonably pertinent to diagnosis or treatment."

As the evidence commission comment notes, the guarantee of trustworthiness for such hearsay is the patient's motivation for proper diagnosis and treatment. The comment goes on to state that this guarantee is obviously not present where the patient is obtaining the physician's diagnosis for the purposes of litigation, as in the present case. As a consequence, statements made to a physician who is diagnosing for the sole purpose of litigation are not admissible by virtue of Rule 803(4). Instead, most authorities point to Rule 703 as the vehicle to get such hearsay into evidence.

For example the Montana Commission Comment to Rule 803(4) describes the inherent untrustworthiness of diagnostic statements made for litigation but concludes "However, these types of statements would be admissible as the basis for an expert's opinion under Rule 703 . . . "

Rule 703 allows experts to base their opinions on three distinct sources of information. The first is of course facts or data perceived by themselves. The second is facts or data made known to the expert at the trial. The third, which is applicable here, " . . . consists of presentation of data to the expert outside of court and other than by his own perception." Commission Comment to Rule 703, quoting the Federal Rules Advisory Committee's Note, 56 F.R.D. at 283.

The third basis for expert opinions must be read in conjunction with Rule 705, which allows the expert to render his opinion without first disclosing the underlying facts or data he is relying on, "unless the court requires otherwise." The Commission Comment and other authorities discussing Rule 705 make it clear that this provision was designed to do away with hypothetical questions, although it has another effect, germane to this discussion. The rule also abolishes the requirement that the underlying facts be placed in evidence at all. The rule of course grants the court the power to require the introduction of the underlying data. In the context of this case, the question is whether the rule allows the court to prohibit the expert from relating the facts he ostensibly is relying on for his opinion.

Most courts which have considered this question have concluded that the trial judge does have the power to so limit an expert's testimony, and have expressly upheld it in cases like the present one. There is an annotation on the point at ALR.3d 778. The annotation summarizes the general rule at 781 and 782 by first describing the distinction between treating physicians and ones retained for litigation purposes, and noting that there is a division of authority even for treating physicians. The annotation then states:

> The courts uniformly hold that a physician consulted for the sole purpose of testifying may not relate the patient's statements concerning his past pain, suffering and subjective symptoms. However, a number of courts allow the physician to relate such statements, not for the purpose of proving the truth of the facts stated, but merely to show the basis of the

physician's opinion . . . "
37 ALR.3d at 782.

The actual case discussion that follows is less charitable to the minority view, stating that only "a few" courts have allowed such testimony, and again even there, not as proof of their truth, but only to show the basis for the opinion. 37 ALR.3d at 823.

This distinction is noted by Judge Weinstein in his treatise on the Federal Rules of Evidence, when he discusses the relationship between Rule 803(4) and Rule 703 as follows:

> "Many jurisdictions, however, permit a non-treating physician to recite the patient's statements, not as proof of the facts stated but to show the basis of the physician's diagnosis or opinion. . . . Rule 703 acknowledges this by providing that the facts on which expert testimony is based need not be admissible if of a kind ordinarily relied upon by experts in the particular field. Rule 703 also assumes that in addition to the class of facts being reliable, the particular facts relied on will be trustworthy because the integrity and specialized skill of the expert will keep him from basing his opinion on questionable matter. The right to cross-examine the expert reinforces the probability of reliability.
>
> . . .
>
> The test for statements made for purposes of medical diagnosis under Rule 803(4) is the same as that in Rule 703 — is this particular fact one that an expert in this particular field would be justified in relying upon in rendering his opinion?
>
> It should also be noted that reliability in medical testimony is enhanced by procedural rules, and that the hearsay dangers inherent in a rule like 803(4) are consequently diminished. Provisions in Rule 35 of the Rules of Civil Procedure and Rule 16 of the Rules of Criminal Procedure

> referred to by Congress (see Congressional action on Rule 803, supra) entitle the parties to obtain copies of their adversaries' medical reports prior to trial, thereby enabling them to prepare for effective cross-examination.
>
> . . .
>
> Of course, despite the substantive effect given these statements by Rule 803(4), a trial judge may find that evidence of this kind is insufficient under the circumstances of the case to sustain a verdict, particularly when the declarant is available and fails to testify to the facts in the statement and there is no other evidence on the point."

4 Weinstein's Evidence, 803(4)[01] at 803-146 to 147.

Compare this commentary with the facts of the present case. Discovery of the Defendant's expert testimony was virtually nonexistant. His name and involvement in the case was not revealed until the day before he testified at mid-trial. Furthermore, the declarant, Mr. Van Dyken was available, but failed to testify.

These kinds of considerations have been crucial in criminal cases. In United States v. Iron Shell, 633 F.2d 77 (8th Cir. 1980), cert denied, 450 U.S. 1001, the court allowed in a treating physician's testimony about how injuries were received as told to him by a nine-year-old rape victim, but noted the testimony was subject to confrontation and Rule 403 analysis. The court observed that these issues were blunted by the availability of the victim for cross-examination. 633 F.2d at 87.

In Roberts v. Hollocher, 664 F.2d 200, 204 (8th Cir. 1981) the same court refused to allow the entry of a hospital record which read, "Multiple contusions and hematoma, consistent with excessive force," since there may have been an improper motive behind the declaration and the age of the child in Iron Shell "assured trustworthiness." 664 F.2d at 204.

In United States v. McCollum, 732 F.2d 1419, 1422 (9th Cir. 1984) the court upheld the exclusion of videotape

where the defendant related his version of a bank robbery to a forensic hypnotist, who had testified that the defendant had been under hypnosis when he entered the bank. The court cited Rules 801(c), 802, and 803 in stating that the defendant's statements were inadmissible hearsay if offered to prove the truth of the events narrated, even considering Rule 703.

In a civil case, Barrel of Fun, Inc. v. State Farm Fire and Casualty Co., 739 F.2d 1028, 1033 (5th Cir. 1984), an action to collect on a fire insurance policy, the court held it was error to allow an arson investigator to testify when the testimony was based on the results of an otherwise inadmissible psychological stress evaluation test. The court said that Rule 703 does not guarantee the admission of all expert testimony that meets its criteria if the testimony runs afoul of other evidentiary requirements.

In state cases analogous to the present situation, the courts have been reluctant to allow the defendant's hearsay versions to come in through physicians. For example, in Evans v. State, 645 P.2d 155 (Alaska 1982) the court upheld excluding as hearsay the defendant's statements to a non-treating physician regarding his inability to recall the murder he was charged with, as well as other violent incidents which had occurred while he was intoxicated. The court felt the statements were properly excludable even under Rules 703 and 705 as they could have been used for an improper purpose — to prove the truth of what was said.

In State v. Eaton, 633 P.2d 921 (Wash. 1981) a defendant relied on a defense of lack of capacity to form a specific intent due to an alcohol blackout. The trial court "became concerned that, in explaining the basis of his opinion, the psychiatrist would repeat to the jury as hearsay defendant's statements concerning the evening in question, thereby in effect enabling defendant to testify without taking the stand, thus shielding his story from cross-examination." 633 P.2d at 923. As a consequence the trial court refused to allow the psychiatrist to base his opinion on any interviews with the defendant unless the defendant first testified about what happened on the night of the crime. Although the case was

reversed on appeal, the appellate court noted that the psychiatrist was in fact able to testify about his opinion without having to recount the defendant's statements about the night in question, and in a footnote rejected the defendant's claim that the statements were admissible as substantive evidence under Rule 803(4). Footnote 7, 633 P.2d at 924.

Finally, in Jahnke v. State, 682 P.2d 991, 1005-07 (Wyo. 1984) the court affirmed a conviction for manslaughter of the defendant's father and held that the trial court properly excluded hearsay testimony of a forensic psychiatrist who sought to testify about the defendant's version of his home life and abuse by his father. The court in part based its decision on the fact that even testimony falling within Rule 803(4) can be excluded pursuant to Rule 403 when there are countervailing considerations such as unfair prejudice or misleading of the jury.

In conclusion, it appears the court has a reasonable amount of discretion in this area. The State believes that discretion should be exercised here to limit the testimony of Dr. Mandel to his opinion and the scientific reasons for it. He should not be allowed to give the Defendant's version of the crime. This is because: (1) there was no showing in the transcript that a recitation of the details of the Defendant's version of "what happened" is necessary for Dr. Mandel to state his opinion; (2) even if there were a showing of such a necessity, Rules 705 and 403 allow the Court discretion to limit the fashion in which the facts are presented; and (3) it is fundamentally unfair to allow this crucial testimony to come in via hearsay not subject to cross-examination of the declarant. This is especially true where the witness who repeats the hearsay is a skillful and highly trained professional.

RESPECTFULLY SUBMITTED this 7th day of February, 1986.

_____

Robert L. Deschamps III
Missoula County Attorney

APPENDIX N

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF MISSOULA

* * * * * * * * * * *

STATE OF MONTANA,	*	Cause No. 6877
Plaintiff,	*	Filed: March 31, 1986
vs.	*	D.N.# : 117
FRED DANIEL VAN DYKEN,	*	
Defendant.	*	

* *

DEFENSE MOTION IN LIMINE AND BRIEF

MOTION

COMES NOW Defendant through undersigned counsel and moves that the court enter its order before trial:

1. Permitting the defense psychiatrist to testify to substantially the same matters as he did at the first trial.

2. Prohibiting any psychiatrist who has examined the Defendant on behalf of the State from testifying.

3. Prohibiting the State from introducing in evidence, or using for any purpose, the defendant's alcohol treatment records, or any other records, documents, or material related to Defendant's medical or psychiatric history, or character, which have been obtained, discovered or disclosed since the first trial.

4. Prohibiting the State from calling any "jailhouse witnesses" to testify to statements allegedly made by defendant in connection with, or subsequent to, the first trial.

5. Prohibiting the State from endorsing any additional witnesses on the Information.

6. Prohibiting the State generally from introducing in evidence or using at trial any evidence not used at, or obtained since, the first trial.

ARGUMENT

Fundamentally, it is the defense contention that the prosecution should not be allowed substantially to improve its case, or derive tactical advantage, as a result of the first hung jury mistrial.

This motion is grounded on basic principles of double jeopardy law. While it has been held that retrial of a defendant following a mistrial declared as a result of a hung jury is not barred by double jeopardy on that ground alone, State ex rel Forsyth v. Dist. Ct., 701 P2d 1346, 1355 (Mont. 1985), Richardson V. U.S., 104 S.Ct. 3081, 3085 (1984), it has often been pointed out that the primary policy underlying the double jeopardy clause is one of protecting an individual accused of crime from the increased chance of unjust conviction arising from repeated submission to the ordeal of a criminal trial. The classic formulation of this is found in Green v. U.S., 355 U.S. 184, 187-88 (1957):

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well a enhancing the possibility that even though innocent he may be found guilty." [emphasis added].

In the California case of Larois v. Sup. Ct., 594 P2d 491, 496 (1979), this rationale was further elaborated upon as follows:

> "Without the guarantee against double jeopardy, the chances of convicting innocent persons would be vastly increased, both because the State would have unlimited opportunities . . . and because the exposure of the accused's defense in the first trial would provide the State

with a major advantage in preparing for the second." [emphasis added].

Much of the double jeopardy jurisprudence of the last few decades has in fact turned on the question of possible prosecutorial advantage gained as a result of a mistrial. The possibility of the State's case being strengthened on a second trial has been the deciding factor in non-hung jury cases such as Downun v. U.S., 372 U.S. 734 (1963); Burks v. U.S., 437 U.S. (1978) and Oregon v. Kennedy, 456 U.S. 667 (1982); see generally, Findlater, Retrial After a Hung Jury: The Double Jeopardy Problem, 129 U.Pa.L.Rev. 701, 718-732 (1981). As was definitively stated in Arizona v. Washington, 434 U.S. 497, 508 (1978): "The prohibition against double jeopardy unquestionably forbids the prosecutor to use the first proceeding as a trial run of his case."

This line of cases has scrutinized with care the intended or foreseeable effect of a mistrial on the strength of the prosecution's case, with the awareness that, with the vast resources available to the State, enhancing that strength too greatly at a second trial unacceptably increases the chances for unjust conviction. Double jeopardy considerations have been held to bar further proceedings where "the prosecutor is using the superior resources of the State to achieve a tactical advantage over the accused," Arizona supra, 434 U.S. at 508.

Similarly, this same result should be prohibited after a mistrial declared following a hung jury. In this situation, in fact, the problem is perhaps more egregious as far as the interests of the accused identified in Green are concerned, for the entire defense has been exposed (as pointed out in Larios); the prosecution is aware of every weakness, in minute detail, of its own case; and, furthermore, the very fact the jury was unable to agree on conviction indicates the increased probability that conviction at the second trial will be "unjust." In this circumstance, it becomes a legal necessity to prevent the second trial from becoming a State's encore of the preview, or trial run, gained from the first trial. Furthermore, the trial court has ample authority to prevent this from occurring. As stated in the leading Ninth Circuit case on double jeopardy

law, U.S. v. Sanders, 591 F2d 1293, 1296 (1979): double jeopardy considerations cannot "be applied mechanically or without attention to the particular problem confronting the trial judge." As stated in Illinois v. Somerville, 410 U.S. 458, 464 (1973), "virtually all of the [double jeopardy] cases turn on the particular facts and thus escape meaningful categorization." And as stated in Gori v. U.S., 367 U.S. 364, 369 (1961):

> "Judicial wisdom counsels against anticipating hypothetical situations . . . in which the defendant would be harassed by successive, oppressive prosecutions, or in which a judge exercises his authority to help the prosecution, at a trial at which its case is going badly, by affording it another, more favorable opportunity to convict the accused."

This same principle should find application in the hung-jury retrial situation to move the discretion of the court to prevent, insofar as possible, the second trial from becoming "a more favorable opportunity to convict the accused."

The propriety of granting the instant defense motions becomes more apparent when one considers that these paramount double jeopardy concerns are reinforced by the application of the doctrine of the law of the case. In State v. Carden, 555 P2d 738, 740 (1976), the Montana Supreme Court held that the law of the case principle applies in a criminal proceedings, and applies to trial court rulings in the course of proceedings on the same case, as well as appellate rulings on remittitur. In Carden, the court explained that, unless there exist imperative reasons to reconsider a ruling once previously made in a case by the trial judge, that ruling should not be changed in the course of the proceeding. But if this doctrine applies to pretrial and interlocutory determinations by the district court in a case, and to subsequent rulings of the trial court in a case upon remand after a decision of the Supreme Court, it should apply with even more force to a second full jury trial of the cause. Once jeopardy attaches, which it does once the original trial jury is sworn, Forsyth, supra, 701 P2d at 1355, then these strong considerations of sound judicial

policy are reinforced by constitutional considerations, in suggesting that the trial court should be extremely reluctant to permit the legal and evidentiary posture of the case to be altered significantly in the prosecution's favor upon the second trial.

RESPECTFULLY SUBMITTED this 31st day of March 1986.

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Associated Counsel for Defendant

APPENDIX O

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE MISSOULA COUNTY

* * * * * * * * * * *

STATE OF MONTANA,	* Cause No. 6877
Plaintiff,	* Filed: February 27, 1987
vs.	* D.N.# : 169
FRED DANIEL VAN DYKEN,	*
Defendant.	*

* *

RENEWED MOTION TO STRIKE PORTIONS OF COURT'S INSTRUCTION G FROM FURTHER PROCEEDINGS

Comes now the State of Montana and renews its Motion dated February 11, 1986, to strike portions of Court's Instruction G, relating to the definitions of "purposely" and "knowingly" from further proceedings in this cause.

This Motion has never been ruled on by the Court. The Renewed Motion is supported by the Briefs filed on the original Motion, as well as the Briefs on the issue in this case filed with the Montana Supreme Court.

DATED this 27th day of February 1987.

_____

Robert L. Deschamps III
County Attorney

APPENDIX P

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF MISSOULA

* * * * * * * * * * *

STATE OF MONTANA,	*	Cause No. 6877
Plaintiff,	*	Filed: March 31, 1987
vs.	*	D.N.# : 185
FRED DANIEL VAN DYKEN,	*	
Defendant.	*	

* *

DEFENSE MOTION IN LIMINE TO USE INSTRUCTION G

COMES NOW the Defense and moves that the Court rule in advance of trial that it will use Instruction G [attached hereto in the original text given by the Court to the jury at the first trial] to instruct the jury on the mental elements of the crime of deliberate homicide.

DATED this 31st day of March, 1987.

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APPENDIX G

INSTRUCTION G

You are instructed that the offenses of deliberate homicide and mitigated deliberate homicide relate to conduct which is done deliberately; that is "knowingly" or "purposely." On the whole, it is a person who means to do the thing that constitutes the crime, knowing he is doing it, and knowing that there is a substantial and unjustifiable risk in doing it, whose mental state falls within these definitions.

For deliberate homicide and mitigated homicide, the State must prove beyond a reasonable doubt that the defendant not only did an act which caused the (result of) death, but that he did it with the knowledge that he was causing or with the purpose to cause the death.

More specifically, the mental state "purposely" is the more serious or wrongful mental state and implies an objective or design. It is where a person's conscious object is to cause a particular result.

"Knowingly" refers to a state of mind in which a person acts, while not toward a certain objective, at least with full knowledge of relevant facts and circumstances. Where a person is aware that it is highly probable that a certain result will be caused by his conduct, he acts knowingly with respect to the result of that conduct.

[Given by the court during jury deliberations at the first trial, September 21, 1985.]

APPENDIX R

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF MISSOULA

* * * * * * * * * * *

STATE OF MONTANA,	*	Cause No. 6877
Plaintiff,	*	Filed: March 31, 1987
vs.	*	D.N.# : 186
FRED DANIEL VAN DYKEN,	*	
Defendant.	*	

* *

DEFENSE MOTION TO RECONSIDER RULING LIMITING DEFENSE PSYCHIATRIST'S TESTIMONY

COMES NOW the defense and moves that this Court reconsider its earlier ruling in limine precluding the defense psychiatrist Dr. Mandel from testifying as to the Defendant's version of the shooting incident.

This motion is made on the grounds that such preclusion of testimony will subject Defendant to double jeopardy, in contravention of his rights under the United States and Montana constitutions. Defendant requests that Dr. Mandel be permitted to testify as to the transaction in substantially the same way he was allowed, without objection, to do at the first trial.

DATED this 31st day of March 1987.

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APPENDIX S

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF MISSOULA

* * * * * * * * * * *

STATE OF MONTANA,	*	Cause No. 6877
Plaintiff,	*	Filed: April 3, 1987
vs.	*	D.N.# : 189
FRED DANIEL VAN DYKEN,	*	
Defendant.	*	

* *

DEFENDANT'S SUPPLEMENTAL BRIEF

[Pertinent portions only: pages 1-13 and 19-24 of this document are not reprinted here.]

8. Motion in Limine to Control Advantages Accruing to the State From Defendant's Jeopardy (DN #117):

The general design of the double jeopardy clause is described in Green v. United States, 355 U.S. 184, 187-88 (1957):

> "The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense . . . The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though in-

nocent he may be found guilty." — quoted in United States v. DiFrancesco, 449 U.S. 117, 127-28 (1981) [emphasis supplied].

Absolutely central to this design is the purpose to protect against the risk of unjust conviction inherent in repeated trials. This was made clear in the recent leading case, Difrancesco, supra:

> . . . "central to the objective of the prohibition against successive trials" is the barrier to "affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." Burks v. United States, 437 U.S., at 11; Swisher v. Brady, 438 U.S., at 215-216. Implicit in this is the thought that if the Government may reprosecute, it gains an advantage from what it learns at the first trial about the strengths of the defense case and the weaknesses of its own. See United States v. Scott, 437 United States v. Wilson, 420 U.S., at 352. - U.S. v. DiFrancesco, supra, 449 U.S. at 128.

In the context of double jeopardy analysis, the serious disadvantages accruing to the defense at a retrial following mistrial have received repeated judicial recognition. Illustrative of State Court findings in this regard are the following:

> "If prosecutors are unsuccessful at a first trial, they hope to use that experience as a dress rehearsal for the better presentation of evidence in the second trial . . . The doctrine of double jeopardy, however, recognizes that the State has the burden of proof, and once a defendant has been put in jeopardy the State cannot retry that issue."
>
> - State v. Castrillo, 566 P.2d 1146, (N.M. 1977).
>
> "Without the guarantee against double jeopardy, the chances of convicting innocent persons would be increased, both because the State would have unlimited opportunities to prosecute an acquitted defendant, and because the

exposure of the accused's defense in the first trial would provide the State with a major advantage in preparing for the second."

- People v. Stone, supra, 646 P.2d 809, 817 (Cal. 1982).

The enhanced risk of unjust conviction on retrial is very obviously, and critically, involved in this case. This is indicated, among other things, by the fact that, since the conclusion of the first trial, the State has filed no less than eleven law motions, each one of which is designed to allow the State to discover new evidence, to improve the presentation of evidence, to emasculate or eliminate defense testimony, or derive other procedural advantage from the prior exposure of the accused's defense at the first trial. In this same period of time, the defense has filed one substantive motion designed to alter the posture of the case — its motion to dismiss (DN #118), based on its contention that the mistrial which ended the first trial in September, 1985, was declared "without manifest necessity." Even this motion, had it been successful, would not have gained the defense a tactical advantage at the second trial — it would simply have prevented it from occurring. The remainder of the defense motions filed in the case since September, 1985, would have the effect of maintaining the evidentiary and procedural status quo from the first trial.

It has already, of course, been established by the Supreme Court that the September, 1985, mistrial was properly declared, on account of the jury's inability to reach a verdict; consequently, Defendant's retrial is not barred by the double jeopardy clause. Instead, Defendant's jeopardy continues from the time the Livingston jury panel was sworn. This does not mean, however, that double jeopardy law is irrelevant to the manner in which the second trial is conducted. While of course the second trial cannot be, and probably ought not to be, a carbon copy of the first trial, the central purpose of the double jeopardy clause yet ought not to be totally contravened by permitting the State to utilize the experience of the first trial to improve its case to the point where conviction is a virtual certainty, irrespective of possible innocence. In this regard, it is noteworthy that the State, at the first trial, presented a very

strong prima facie case on the mental element of the crime, based on objective manifestations of Defendant's inner intent. None of the State's pretrial motions has a tendency to strengthen this evidence. Instead, they tend either to weaken the defense case [for example, by seeking to eliminate the crucial defense expert testimony, or the crucial jury instruction given at trial], or to strengthen the State's rebuttal. In other words, the whole thrust of the State's pretrial practice since the first trial has been to exploit every possible avenue of attack on the defense revealed by the Defendant's full exposure to jeopardy up to verdict in September, 1985. It is the constitutional contention of the defense that the State's directly utilizing the prior placement of the Defendant in jeopardy, substantially or wholly to alter the posture of the case and the conduct of the second trial in its favor, exposes the Defendant to double jeopardy in the legal sense, and cannot be allowed. Emphasis must be placed in this analysis on the word "direct." Human affairs and jury trials being what they are, each side is bound to gain certain advantages from there having already been a first trial. Some of these advantages may not even be consciously recognized by the parties. But where the State very deliberately seeks heavily-briefed favorable legal rulings in advance of the second trial, all of which are manifestly based on its knowledge of the defense case — and of its own case — gleaned from the experience of the first trial, the pendulum swings toward the prospect of conviction grounded not so much on guilt, as on former jeopardy. The gravamen of the State's case becomes second-guessing, afterthought, the perfect wisdom of hindsight — all made possible by the Defendant's prior subjection to jeopardy.

With regard to this aspect of the double jeopardy question, the State cites several cases concerning procedures governing "new trials," the most comprehensive of which is United States v. Akers, 702 F.2d 1145 (D.C. Cir 1983). This opinion, while holding that, absent extensive pretrial motion practice, the law of the case doctrine does not govern rulings on admissibility of evidence at a second trial, nowhere addresses the double jeopardy issues that may arise in connec-

tion with the introduction of new evidence, or the exclusion of previously allowed evidence, at a second trial. The issue in fact was not raised in the Akers case, nor in any of the other cases cited by the State on this point.

The defense also is able to cite no case authority directly on point at this time. Strange as it seems, the question has apparently never been fully presented, and is an issue of first impression, in Montana as elsewhere. However, in this regard, it must be kept in mind that double jeopardy is a most complex and difficult area of the law; no less an authority than the United States Supreme Court has explicitly cautioned that in this area there are no "bright-line rules," U.S. v. Jorn, 400 U.S. 470, 486 (1971), and has characterized its own line of decisions on this subject as "a conscious refusal to channel the exercise of discretion according to rules base on categories of circumstances," Jorn, 400 U.S. at 485. Nonetheless, where the central and primary purpose and aim of the double jeopardy concept will be defeated absent remedial action, that action would seem to be constitutionally required. In this case, the mandate of double jeopardy would seem to be to deny all proposed improvements in the State's case flowing from legal analysis, advocacy and maneuvering, as opposed to actual discovery of new factual evidence. The "search for truth," which is the ultimate aim of the criminal trial, will not be seriously impeded, if at all, by requiring the State to prove its case again with the evidence it assembled in the nine months following the crime, unaugmented by the possible fruits of over 15 months' worth of legal reflection on the tactics of the trial. Permitting the State to put on its "dream case" is violative of the Amendment, when the dream could not have been dreamed if the Defendant had not already undergone the full ordeal of a trial.

[End of excerpt.]

APPENDIX T

TRANSCRIPT OF COURT-COUNSEL COLLOQUY CONCERNING PRE-TRIAL MOTIONS

April 27, 1987.

MR. DESCHAMPS: The question about Instruction G is indeed fundamental, and it might be helpful for the Court to understand exactly what happened. This Instruction was not actually given by the Court as a part of the usual instruction process. Some instructions that we felt perfectly satisfied with were given.

About midnight, or maybe even one o'clock, the jury, after deliberating for some twelve hours or so, sent out a note which, frankly, counsel was not permitted to see until sometime later. The note is reproduced at the end of one of the Supreme Court briefs, but Judge Olson called counsel in, and he said, "The jury is confused about the definition of purposely and knowingly." He didn't tell us that the jury — the note as I recall said something to the effect that they were close to a decision, could they make a recommendation, and then kind of as an afterthought said we are having some questions about purposely and knowingly.

He didn't tell us about the first part of the note, just the last part. We debated this for about an hour or so in the middle of the night, and the Judge told counsel to go and ponder this and meet the next morning at 7:30 and discuss it further.

The next morning Carol Mitchell appeared with a handwritten, about a two-page brief, relying on the decision in State v. Weinberger, which as we explored in some of the earlier briefs, actually relied on the earlier McKenzie case, and frankly both cases more or less as dicta had some language which I view as essentially an instruction for a specific intent to kill. The Court accepted that particular rendition and gave it.

Clearly when the jury got that, the possibility of them resolving this thing evaporated and they hung. Subsequently,

we had time, of course more leisurely than instead of in the middle of the night after two weeks of trial, to explore this, and we discovered what I just said.

This first of all is essentially dicta, secondly, it is not good law in the State of Montana, and in fact the Sigler case that we have cited and urge upon the Court is the most current and trustworthy rendition of homicide law in this State, and we think the jury ought to be instructed in that regard rather than based on some instruction that was conjured up in the middle of the night.

Otherwise, I think I can just refer you to the briefs. It more than adequately covers this whole issue.

The other thing — well, two other items that I noted Mr. Boggs mentioned were the question about reconsidering Dr. Mandel's testimony. We think that it is the law in this case. We think Judge Olson's ruling was reasonable and proper, and we would ask the Court to uphold that decision.

Frankly, the problem with Dr. Mandel's testimony was that the Defendant did not testify. Dr. Mandel did and he gave the blow-by-blow account of what happened the night of the shooting.

Dr. Mandel is a very effective and eloquent witness. He in essence testified as the Defendant's alter ego, and that was the concern I know Judge Olson had, and it certainly was the concern we had.

By getting up there and giving detail by detail the Defendant's account, he was testifying and becoming, in the eyes of the jury, the Defendant on this in a much more favorable fashion than the Defendant himself could do — and minus the opportunity for the State to cross-examine that witness's recollection, because he was simply repeating what somebody else told him, and I think that was a real evil in that particular testimony that Judge Olson was attempting to stop.

[Discussion of other subjects omitted.]

MR. BOGGS: With respect to the Mandel testimony and the law of the case, I just want to make it extremely clear that our only grounds for asking the Court to reconsider that one ruling, which we agree is the law of the case insofar as it has been determined, is Judge Olson never ruled on our

double jeopardy motion which suggests that the evidentiary posture should not be altered fundamentally as a result of the Defendant's subjection to jeopardy, and this is the one ruling Judge Olson made that, if that one argument were to be accepted, would have to be revised. So, the double jeopardy basis is our entire basis for our motion to reconsider that particular ruling.

With respect to the jury instruction, Mr. Deschamps has very accurately stated that the giving of the Instruction to the jury on what deliberate homicide means caused them to fail to reach a verdict, because there was a question whether the Defendant deliberately committed the crime, and I would suggest that because the State doesn't like the fact that the jury had to come to grips with that, properly instructed, is not a reason not to give the instruction.

It was conjured up in the middle of the night, but it reads identically with the material that I just submitted to the Court from the basic textbook on substantive criminal law published in 1986. So, it was conjured in the middle of the night, but it turned out to be a remarkably accurate statement of the law, and the instructions that were originally given were the State's instructions, which the defense objected to, and they did instruct the jury essentially to find the Defendant guilty of deliberate homicide without reaching the question of whether he did it deliberately or not.

[Discussion of other subjects omitted.]

THE COURT: Any reply?

MR. DESCHAMPS: Just one. Let me talk about some of the psychiatric and psychological testimony for just a moment, if I may. When Mr. Van Dyken was arrested in December of 1984 — I guess '85 — '84 —I don't know — that morning he had been in jail maybe four or five hours at the most. He was examined or interviewed by both Dr. Al Walters and Dr. Will Stratford, not with the idea of doing some full-blown psychiatric evaluation, but merely to get some idea if he was oriented as to time and place or suffering from some obvious mental disease or defect that would make him a

suicide risk or something of that sort. They talked to him and looked at him, and they arrived at some opinions of what transpired.

As I mentioned earlier, the day or so before the trial actually commenced, the defense filed a notice that the Defendant was going to be relying on a defense that he didn't have the appropriate state of mind to constitute the offense, and they were going to rely on alcohol. They named a couple people, neither one of which testified.

Midway through the trial, in fact exactly midway through the trial, Dr. Mandel appeared on the scene — very near the end of the State's case. We objected. We filed a brief. Our objections to the mid-trial psychiatric testimony were overruled. Dr. Mandel did in fact testify.

We, in rebuttal, asked Judge Olson if we could put Dr. Stratford and Dr. Walters on in rebuttal because they had seen Mr. Van Dyken contemporaneously with the criminal event. Judge Olson looked at me and he said, "How are you going to handle Estelle v. Smith?" I said, "What is Estelle v. Smith?"

He didn't elaborate very much, but I did look it up, and Estelle v. Smith was a U.S. Supreme Court case from about 1981, and in Estelle v. Smith, a psychiatrist examined a death row inmate in Texas at a pretrial proceeding. Neither side had asked for it. I think he was asked by the Court to see if the defendant was competent to stand trial.

The case went to trial and the defendant was convicted, and in Texas they have a bifurcated proceeding on capital cases. No issue whatsoever was raised by anyone regarding mental disease or defect, or mental issue at all.

Then, at the second half, the punishment phase, the State of Texas called to the witness stand this psychiatrist to testify about the defendant's dangerousness. Eventually, the case found its way to the U.S. Supreme Court. The U.S. Supreme Court said you can't do that. It violated the defendant's right to remain silent to put on this testimony, and this was when nobody had even raised it or asked for it.

In a footnote in — actually in the paragraph in the case the court said, no, we do not mean to imply by this that this

case should affect situations where the defendant himself has raised the question of mental disease or defect.

This is a situation where obviously he has raised it, and the State has a right to respond. I don't know, I have argued that footnote and that paragraph to Judge Olson., It didn't seem to move him.

We couldn't get the Supreme Court , of course, to consider the issue, but the key in what the State asks for is the ability to respond to the defense's psychiatric testimony, which clearly opens the door, which clearly waives any privilege about his state of mind and that sort of thing.

So, the State should be allowed to respond, and at the minimum we would like to be able to put Dr. Stratford and Dr. Walters on to testify about their observations of this Defendant on the day he was arrested.

Judge Olson wouldn't let us do that. He said, you cannot say anything about what they observed of this Defendant that day, either his words or his acts. We were constrained to putting on Stratford and Walters to talk in generic terms about the effects of alcohol, without any ability to relate it personally to this Defendant.

Now, subsequent to the trial we asked for our own psychiatric evaluation on the grounds of the Oswald and Peavler cases. He denied that, so here we sit with no psychiatric evaluation.

The only people that have ever seen this guy have not been allowed to say what they observed on the day he was arrested or on the day of the crime. That is the real nub of this thing. We want to be able to respond to those defenses, and if we could even get Dr. Stratford and Walters to be able to say what they saw, that would help.

So, I guess that is what I am saying about untying the blindfold and our hands.

THE COURT: Stratford and Walters didn't give him any Miranda warning, did they?

MR. DESCHAMPS: No, they did not.

THE COURT: Anything else?

[End of transcript.]

APPENDIX U

TRANSCRIPT OF SETTLEMENT CONFERENCE ON INTENT INSTRUCTION

June 24, 1987:

MR. BOGGS: We need to go over one more instruction.

THE COURT: Okay.

MR. BOGGS: That would be State's proposed 5, which the Court proposes to give , I believe in its modified form, as Instruction 12 on purposely.

THE COURT: Yes.

MR. BOGGS: In view of the discussion we just had on knowingly I believe that this instruction on purposely needs to be modified to strike out the reference to conduct and simply specify result.

THE COURT: I don't think so. No, I reject that. I modified it simply to say an element of an offense. I reject that notion. Knowledge and result, I mean presumably what you are saying what we have to say in this case is that if someone did not intend a particular result or conduct—let me start over again.

I think that Mr. Van Dyken can be convicted legitimately by a jury if they agree that he intended to shoot Sgt. Kimery but did not intend to kill him, and that is my reading of the statutory scheme, and that would be purpose, intent of a particular conduct even if he had no intent of killing him. So that is the reason I am going to leave conduct in rather than result. I agree conduct and knowledge are disparate. There is a disjunctive there or discordance that I think might confuse the jury that just shooting alone isn't enough if —I mean he couldn't have shot him square in the chest — I mean that has to fall under purpose, but doesn't have to be a result that is intended. So I'm leaving that one as is.

Any other argument for the record?

MR. BOGGS: Thank you, Your Honor, thirty seconds.

THE COURT: That's fine.

MR. BOGGS: Reading this instruction, a juror could find he acted purposely if he had a conscious object to engage in that conduct — a juror could interpret "that conduct" to mean firing the gun. Therefore, under this instruction if they found the Defendant meant to fire the gun, they could find him guilty of deliberate homicide.

THE COURT: Yeah, but firing a gun alone is not the only element of the offense.

MR. BOGGS: Precisely.

THE COURT: They have to also read it in conjunction with the definition of deliberate homicide. The conduct there is doing the act that caused the death. So they have to be read together. I think that is possible. It would be remote — that it would be interpreted that way is only remotely possible, and I think read in conjunction with the other definitions of the crimes charged, that it is not — it is permissible.

Any other record?

MR. BOGGS: The defense feels in a case like this that a remote possibility is too much. Thank you.